United Nations AT/DEC/1209

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1209

Case No. 1296: EL-ANSARY Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of Mohamed El-Ansary, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 2003 the time limit for the filing of an application with the Tribunal;

Whereas, on 21 May 2003, the Applicant filed an Application requesting the Tribunal, inter alia, to find:

> 8. ...
>
> (a) that the Secretary-General failed to carry out a fair and correct selection process for the [P-5 position of Chief, Copy Preparation and Proofreading Section,] since his representatives provided inaccurate or incomplete information to the Appointment and Promotion Board (APB) with respect to the managerial qualifications of the staff member selected for the post ...
>
> (b) that the Secretary-General's representatives had also informed in error the APB 'that there were questions regarding [the Applicant's] people management skills', which resulted in his non-selection for the post ...

(c) accordingly, that the selection process was tainted by inaccuracies and prejudicial statements and there was denial of due process in respect of the Applicant. ...

9. [And] to order:

(a) that [the Applicant] be given compensation equivalent to the difference between his emoluments at the P-4 [step 13] and P-5 levels for a period of at least two years; and,

(b) that he be further awarded compensation for the damage to his professional reputation."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2003 and once thereafter until 30 November 2003;

Whereas the Respondent filed his Answer on 7 November 2003;

Whereas the Applicant filed Written Observations on 24 February 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"*Employment history*

... [The Applicant] was recruited in July 1980 on a two-year fixed-term appointment as an Arabic Proofreader at the P-2 level in the Department of Conference Services at Headquarters. In July 1982, he was granted a probationary appointment, and, in December of that year, became Chief, Arabic Group, Copy Preparation and Proofreading Unit. [The Applicant] was granted a permanent appointment and promoted to the P-3 level effective April 1983. He was promoted to P-4 in October 1986.

Summary of facts

... Responding to a vacancy announcement, [the Applicant], on 19 June 1998, submitted his application for the P-5 post of Chief of what had become the Copy Preparation and Proofreading Section (CPPS). Having been informed by a letter of 30 July 1998 from ... [the] Executive Officer, [Department of General Assembly Affairs and Conference Services (DGAACS)] that the Department had recommended another candidate, [the Applicant] submitted additional information to the [APB] on 10 August 1998. On 2 September 1998, [the] Secretary, APB, wrote to inform him that he had not been selected for the post.

... In a memorandum addressed to the Secretary-General on 12 October 1998, [the Applicant] requested an administrative review of the decision not to select him for the post."

On 15 December 1998, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 30 April 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations***
>
> 10. The Panel began its discussion recognizing that it could not, as requested by [the] Appellant, recommend that the promotion of another staff member be revoked, nor could it substitute its judgement for that of the APB.
>
> ...
>
> 11. The Panel had no doubt that ... [the] memorandum [of the Secretary, APB,] of 13 November 1998 ... was an accurate account of the APB's deliberation ...
>
> 12. [The] Appellant has submitted a number of documents ... including several originating in the Staff Union, that put in doubt the favourable evaluation of [the Chief, Distribution Section's] managerial qualifications. ...
>
> ...
>
> The Panel could only thus conclude that the representatives of DGAACS had provided inaccurate or incomplete information to the APB with respect to [the Chief, Distribution Section's] managerial qualifications.
>
> 13. Conversely, the same representatives had informed the APB 'that there were questions regarding [the Appellant's] people management skills'. The Panel found no evaluation of those skills in [the] Appellant's Official Status file, with the possible exception of the PAS for the period April 1997 to March 1998 which stated:
>
> > 'Has a very good record of supervising the unit with very good results in efficiency. ...
> >
> > Maintain (*sic*) co-operative working relations within the unit; develops a co-operative and inclusive team work environment which results in high production with quality.'
>
> Thus, the negative appraisal given orally to the APB was one which [the] Appellant had no opportunity to rebut, and was a denial to him of due process.
>
> Having concluded that the information provided by the Department to the APB was defective by [the] Respondent's own standard of objectivity ... and that [the] Appellant was, therefore, denied due process, the Panel turned to a discussion of the possible remedies it could propose and the rationale for it. It concluded that, while it could not recommend promotion, an appropriate indemnity would be based on the difference in emoluments between the P-4 and P-5 levels.
>
> ***Recommendation***
>
> 15. The Panel recommends to the Secretary-General that [the] Appellant be paid an indemnity equal to the difference in base salary between the P-4 and P-5 levels (step 1, in both cases) for a period of six months.
>
> ..."

On 31 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "The Secretary-General regrets that, though the Board emphasized in paragraph 10 of its report, that it cannot substitute its judgement for that of the APB, it did just that in this case. The comparative evaluation of candidates is entrusted to the APB. Though candidates may understandably sometimes be tempted to compare themselves to the other candidates, this is not what the process envisages. Similarly, it is not for the Joint Appeals Board to undertake such comparative evaluation and to second guess the APB, as doing so would jeopardize the process and functions that have been entrusted to that joint advisory body. Moreover, the Secretary-General notes that you were invited to submit additional information to the APB in support of your candidature. You did so and the APB considered the additional information you submitted and nevertheless did not recommend you for the post. For all these reasons, the Secretary-General does not accept the conclusions of the Board that the APB process was defective or that you were denied due process. He has accordingly decided not to accept the recommendation of the Board and to take no further action on your case."

On 21 May 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's qualifications were not fully and fairly considered in the promotion process.

2. The information proved to the APB was defective, in effect, erroneous under the Secretary-General's own standard of objectivity and fairness, and the Applicant was therefore denied due process.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to promotion but only to consideration for promotion, regardless of good performance evaluation and length of service. The Applicant was fully and fairly considered for promotion, and his rights were not violated by the decision not to select and promote him to the P-5 post he sought.

2. The Applicant's due process rights were respected.

3. The contested decision was not tainted by prejudice, improper motive or other extraneous factors.

4. Neither the Applicant, nor the JAB, nor the Tribunal can substitute their judgement for that of the APB.

The Tribunal, having deliberated from 4 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant challenges a decision by the Respondent not to promote him to the P-5 position of Chief, Copy Preparation and Proofreading Section. The Applicant asserts that the promotion process was flawed because representatives of the Respondent provided inaccurate information and advice to the APB, in relation to both the Applicant and Ms. S., the candidate who ultimately was successful in obtaining the post. The Applicant further alleges that the tainted application process led to a denial of his rights to due process and that he was not fully and fairly considered. The Respondent, in defence, asserts his broad discretionary power of promotion, alleging that the Applicant was indeed fully and fairly considered by the APB, which carried out its duties in accordance with appropriate and fair procedures. The Applicant seeks compensation for the alleged violation.

II. The Tribunal "recognizes that the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General". (See Judgement No. 1117, *Kirudja* (2003).) Thus, "qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion". (See Judgment No. 958, *Draz* (2001).)

This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not absolute; the Administration's discretion shall be reviewed when there are allegations of abuse of discretion. (See, *Kirudja* (*ibid.*) citing Judgement No. 870 *Choudhury* and *Ramchandani* (1998).) Article 101 of the Charter and staff regulation 4.2 provide that "the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". In order to achieve this purpose, it is imperative that "full and fair consideration" be given to all applicants for a post. (See Judgement No. 828, *Shamapande* (1997).) In paragraph VI of *Shamapande*, the Tribunal stated:

> "The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. In Judgement No. 447, *Abbas* (1989), the Tribunal further specified that 'reasonable' and 'measurable' were the standards

> applicable in such cases. '... such consideration should to some measurable degree meet the criterion of 'fullest regard' in a reasonable manner'."

The burden of establishing that the Administration has failed to fully and fairly consider the Applicant's candidacy, however, does not fall on the Applicant. Rather, as the Tribunal held in Judgement No. 362, *Williamson* (1986), para. VII:

> "If once called seriously into question, the [Respondent] must be able to make at least a minimal showing that the [Applicant's] statutory right was honoured in good faith in that the [Respondent] gave the 'fullest regard' to it".

Thus, while the Tribunal recognizes that it cannot substitute its judgement for that of the APB, and thus, will not examine the qualifications of the Applicant, vis-à-vis those of the successful candidate and whether the Applicant might have gotten the post, the Tribunal must assess whether the Applicant was fully and fairly considered in the promotion process.

III. The Applicant's management skills were, if not the decisive factor in the decision not to promote him, at least a tremendously significant factor. Thus, it is crucial to the Tribunal's determination of full and fair consideration to determine whether the statements to the APB by the Programme Manager were true and therefore warranted, or whether they were inaccurate or made in circumstances which were damaging to the fairness of the process.

In the context of the promotion process, the Applicant's management skills were called into question by the Programme Manager. In making its recommendation to promote Ms. S. rather than the Applicant

> "[T]he APB paid particular attention to the assessment of Ms. [S] and [the Applicant] [vis-à-vis] the managerial and leadership ability required by the post. It took note of the statement of the Department that 'given the serious managerial challenges awaiting the new Chief of the Section', the post required a 'strong leader who would command respect and be able to provide direction and guidance to the staff'. ... The Programme Manager recognized [the Applicant's] considerable experience in the Section and evaluated him as highly qualified from a technical point of view; however, while he had often served as Officer-in-Charge of the Section, 'there were questions regarding his people management skills'."

It is this last sentence that the Applicant alleges is inaccurate, which reflected negatively on his chance for promotion and which therefore prevented him from being considered fully and fairly in the promotion process.

The Respondent argues that the Applicant was accorded full and fair consideration: namely, that:

> "(a) the APB informed the Applicant that his Department had recommended another candidate;
>
> (b) it gave the Applicant the opportunity to submit further information relating to his suitability for the post;
>
> (c) it duly considered such additional information and concluded that another candidate was better suited for the post than the Applicant;
>
> (d) the result of the selection procedure was promptly communicated to the Applicant."

Although it appears to the Tribunal that indeed all of these procedures were followed, the Respondent's assertions beg the question of full and fair consideration. The Secretary-General has established, through staff rules, a formal review process which not only provides rights and benefits to the staff members, but which also obligates the Respondent to respect the rules and procedures of such process. The essential features of this review system include the requirements that a performance report be prepared annually by a staff member's supervisor and that such performance reports form part of the staff member's personnel file. Staff members are to be evaluated for their efficiency, competence and integrity through a performance appraisal mechanism to assess compliance with the standards set out in the Staff Regulations and Rules for the purpose of accountability.

Although the Applicant was invited to submit additional information in support of his candidature, after he was notified that another candidate was preferred, he was never told that his management skills were being questioned. Therefore, he was not afforded the opportunity to defend his skills against negative allegations that he alleges were inaccurate and incorrect. Based on the Tribunal's review of the official performance reviews in the record, the Tribunal would have to agree with the Applicant, that the comments made by the Respondent with respect to his management skills were not borne out by those official reviews. It should be self-evident that the making of any informal comments without the Applicant having the opportunity to rebut those comments is a flagrant contradiction of transparency of the Staff Rules and cannot be tolerated.

The Tribunal notes that, in fact, the Applicant's PER covering the period of 1 February 1992 to 31 March 1996, as well as his PAS for the period 1 April 1997 to 31 March 1998 make no mention of any managerial defect but make rather positive comments in this regard. This positive, official assessment of the Applicant's management is further borne out by the fact that for years, both before and after the promotion exercise, the Respondent appointed the Applicant to be Officer-in-Charge of the Section. It belies common sense that the Respondent would repeatedly entrust the Applicant with such a significant position requiring managerial skills if the criticism made by the Programme Manager were actually justified, *i.e.*, if there were a problem with "his people management skills". Therefore, the Tribunal finds that the statement by the Respondent in the promotion process, which raised questions about, and cast a negative light on, the Applicant's management skills, was inaccurate and untrue, based upon the assessments of those skills made by the Respondent himself in the context of general staff member evaluations. It was also inconsistent with the repeated and continuous appointment of the Applicant as Officer-in-Charge.

IV On this point, the Respondent further asserts that his concerns about the Applicant's people management skills did not pertain to the Applicant's past abilities, but instead to his ability to manage in the future. The Respondent asserts that the job called for a strong leader, and while the Applicant was technically excellent, the Programme Manager had doubts about the Applicant's ability to lead and manage, on a going-forward basis. The Tribunal cannot agree with this reasoning. In assessing the Applicant's future performance, the Respondent could obviously only rely on past assessments of the Applicant's skills. There simply was no basis for concluding that future management skills would prove more negative than the positive evaluations of those skills the Applicant had consistently received in his performance evaluations. Thus, the Tribunal finds that the Applicant was not fully and fairly considered in the promotion process, and for this he is entitled to be compensated.

Finally, the Tribunal feels compelled to comment on the Secretary-General's characterization of the JAB's recommendations. In his letter to the Applicant dated 31 December 2002, the reason stated for rejecting the JAB's recommendations is that "though the [JAB] emphasized ... that it cannot substitute its judgement for that of the APB, it did just that in this case". The Tribunal finds this is a mischaracterization of the JAB's conclusions. In fact, the JAB did not substitute its judgement for that of the APB; it merely concluded that the Administration had provided inaccurate information

with respect to Ms. S and that the Applicant had been denied due process by virtue of the failure of the Administration to allow him to rebut the informal negative comments about his management skills. The JAB's recommendation related only to compensation for the determined due process violation; the JAB did not in any way suggest that the Applicant should have been promoted. It appears to the Tribunal that, in this case, the JAB performed its functions appropriately, and the Tribunal supports its findings of fact and its conclusion that the Applicant's rights were violated, in that he did not receive full and fair consideration for the promotion. Likewise, the Tribunal agrees with the compensation awarded by the JAB.

V. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant the difference in emoluments between the P-4 and P-5 levels at step 1, at the rate in effect on the date of the Judgement, in accordance with the conclusions of the JAB, for the failure to fully and fairly consider him in the promotion process.
2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1210

Case No. 1297: TEKOLLA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 10 January 2003, Yeshewalul Tekolla, a former staff member of the United Nations, filed an Application requesting the Tribunal to order, inter alia, as follows:

> " (c) ... the payment ... of [a Special Post Allowance (SPA)] for the entire period [from 1 October 1993 to 1 November 1995 at the P-4 level and from 15 September 1995 to 30 June 1996 at the P-5 level] taking into account the two, different levels at which he performed the functions of the posts.
>
> ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2003 and once thereafter until 31 December 2003;

Whereas the Respondent filed his Answer on 31 December 2003;

Whereas the Applicant filed Written Observations on 18 January 2004;

Whereas, on 11 October 2004, the Applicant submitted an additional communication;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"*Employment History*

... The [Applicant] joined the Organization on 3 December 1962 on a three-month short-term appointment as a Documents Clerk at the [G-6] level with the United Nations Economic Commission for Africa (ECA). [His] appointment was subsequently extended ... [and, effective 1 March 1974, he was granted a permanent appointment]. ... On 1 April 1979, he was promoted to [the] P-2 level and his title was changed to ... Associate Economic Affairs Officer. On 1 April 1985, he was promoted to [the] P-3 level and his title was changed to Economic Affairs Officer.

...

Summary of the facts

... The [Applicant] ... assumed the duties and responsibilities of an Economic Affairs Officer at [the] P-4 level from October 1993 until 1 November 1995.

...

[On 24 August 1994, the Officer-in-Charge (OiC), Food and Agriculture Policy and Planning Section (FADPPS), wrote to the Director, Joint ECA/Food and Agriculture Organization (FAO), Agriculture Division, concerning '[p]roposals for temporary placement of [the Applicant] on post P4-041' and reminding him of previous communications on this issue, dated 1 April 1994 and 15 July 1994.]

[On 25 November 1994, the Director, Joint ECA/FAO Agriculture Division, requested the Chief, Personnel Section, to place the Applicant against post number P4-041 while the incumbent was on mission and for him to receive SPA to the P-4 level, pending the incumbent's return].

[On 17 March 1995, the Applicant was informed that action was being taken to place him against that post.]

[On 6 September 1995, the OiC, Agriculture Division, wrote to the Chief, Administration and Conference Services Division, confirming that the Applicant had been carrying out the activities of the P-4 post since October 1993; noting that no SPA has been paid to him since he took over the activities of the post; and, seconding his predecessor's recommendation that the Applicant be paid an SPA.]

... [On 15 September 1995, the Applicant also] assumed the duties and responsibilities of [the P-5 post of OiC, FADPPS. He carried out these duties and responsibilities until 30 June 1996.]

[On 2 March 1998, the Office of Human Resources Management (OHRM) advised the Human Resources Management Section, ECA, (HRMS), that the Applicant's pending SPA case was never finalized and requested additional information prior to presentation of the Applicant's case to the SPA Committee.]

[On 14 May 1998, OHRM informed HRMS that '[g]iven the existing policy to restrict the retroactivity of SPA's to one year from the date when the recommendation was first made, as well as a lack of clarity on the exact dates when [the Applicant] was formally assigned to perform the [higher level] functions ... we regret that we are unable to support this request for an SPA'.]

[On 7 August 1998, the Applicant requested HRMS to re-examine his case and forward it to Headquarters 'for favourable consideration and appropriate action'.]

[By e-mail dated 18 August 1998, HRMS confirmed that the Applicant had served as OiC, FADPPS, for ten months, ending in June 1996, and that from October 1993 to November 1995, he was also put against a higher level post (P4-041). The e-mail further stated that the Applicant's request for SPA was justified 'but of course there is the issue of one year retroactivity which we have to take into account'.]

[On 4 December 1998, the Applicant requested early retirement and, on 25 June 1999, he signed a Memorandum of Understanding (MOU) accepting the terms of the agreed termination, which included, inter alia, his agreement that the Organization had no further obligations to him.]

[On 29 June 1999, the Applicant was granted an SPA at the P-4 level for the period from 1 December 1995 until 30 June 1996.]

[On 30 September 1999, the Applicant separated from service.]

... The [Applicant] appealed to [HRMS] on 10 January 2000, claiming that retroactivity should not apply to his case, as the lack of payment had been caused by the failure of the ECA administration to take appropriate action on time.

... [On 27 March 2000] ... [HRMS] rejected the [Applicant's] claims, on the grounds that he had signed [the MOU] stating his agreement that the Organization would have no further obligation financially or otherwise to him upon separation."

On 25 April 2000, the Applicant requested the Secretary-General to review the administrative decision not to grant him an SPA for the two separate posts he had encumbered during the periods October 1993 through November 1995 and December 1995 through June 1996.

On 25 July 2000, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 5 November 2002. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

29. ... [T]he Panel concluded that it was not in dispute that the Appellant performed the duties and responsibilities of the P-4 [post] from October 1993 until November 1995.

32. ... The Panel ... agreed that [the memorandum by the Chief of Personnel Section, to the Appellant, dated 17 March 1995] ... defined the period of the approved entitlement for the SPA. ...

33. The Panel agreed that the Appellant was entitled [to receive] SPA for [performing the] functions of an Economic Affairs Officer at the P-4 level between March 1995 and December 1995, in accordance with the [above-mentioned] memorandum ...

34. As for the P-5 post [of] Officer-In-Charge, the Panel concluded that the Appellant assumed the duties and responsibilities of the post from 15 September 1995 until 30 June 1996.

35. The Panel ... concluded that the Appellant was entitled to SPA in accordance with [paragraph 9 of] Personnel Directive PD/1/84/Rev.1, [entitled 'Special post allowance'] dated 28 September 1990 ...

37. The Panel pointed out that the wording of [the above-mentioned] paragraph 9 clearly indicated that the legislator foresaw a situation in which a staff member may assume duties and responsibilities of a post, which [was] two levels higher than his current level. In such a situation, the staff member [would] not be entitled to receive an SPA [at] the level of the post ... SPA would be [paid] only one level above the ... employee's level.

39. ... [T]he Panel concluded that [the Appellant] was entitled to an SPA to the *P-4 level* for his service as ... Officer-In-Charge, for the period between 15 September 1995 until 30 June 1996, despite the ... *P-5 level* of the post he assumed.

41. The Panel agreed that the Appellant should be paid the [SPA for the] remainder [of the period during which he was performing the duties of] the P-4 and P-5 level posts ... regardless of the MOU ...

42. Moreover, the Panel agreed that the MOU could not have included the SPA issue, because the Appellant had assumed in good faith that the reason for not receiving the SPA was a technical problem and therefore was still pending. In addition, the Panel determined that not including the SPA issue in the MOU does not necessarily indicate that the entitlement or non-entitlement of the Appellant to SPA.

Conclusions and Recommendations

44. In light of the foregoing, the Panel *unanimously agreed* that the Appellant should be paid an additional payment of an SPA for assuming the duties and responsibilities of an Economic Affairs Officer at the P-4 level, for 5 months, the period between 1 July 1995 and 1 December 1995.

45. The Panel further *unanimously agreed* that it should be recommended, in light of the case above and in light of paragraph 9 to PD/1/84/Rev.1, that situations in which a staff member performs the functions of a post two levels higher than his current level, it should be clarified by [OHRM] to the staff member, that he is not entitled to the SPA according to the level of the post encumbered, but only one level higher than his current post. The reason for such a clarification is that a staff member will be able to consider his desire to encumber the position, keeping in mind that there is no correlation between the remuneration for the level of the post encumbered, to that of the SPA. This would prevent any unreasonable expectancy by the staff member, and would avert any misunderstanding between the staff member and OHRM".

On 10 January 2003, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 10 July 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General accepts the conclusion of the Board regarding your entitlement to receive payment of the SPA for assuming the duties and responsibilities of an Economic Affairs Officer at the P-4 level for five months. He has therefore decided to accept the recommendation of the Board, and, accordingly, to pay you five months of the SPA at the P-4 level".

Whereas the Applicant's principal contentions are:

1. Given the JAB's determination, that the Applicant had assumed the P-4 post from October 1993 to 1 November 1995 and the P-5 post from 15 September 1995 to 30 June 1996, it would be "ethically, technically, logically and managerially appropriate" to pay the Applicant SPA for the entire period, taking into account the two different levels of the posts, the functions of which he performed.

2. Personnel directive PD/1/84 Rev.1, on which the JAB relied in recommending SPA only to the P-4 level, fails to establish a positive correlation between the awarded SPA and the nature and magnitude of the work load encumbered by the Applicant.

3. Despite the fact that the Applicant encumbered the P-4 post for 25 months, the JAB recommended SPA for 5 months only, covering only a fraction of the period during which he encumbered the post, and ignoring the confirmation by the Applicant's supervisors of his assumption of the P-4 post as of October 1993.

4. The issue of retroactivity should not apply to the Applicant's case, as it would not have arisen had the appropriate office taken the required steps in a timely manner.

Whereas the Respondent's principal contentions are:

1. The Applicant should be paid, and was awarded, only the additional SPA at the P-4 level for the period from 1 July 1995 to 1 December 1995.

2. The Applicant is not entitled to be paid an SPA at more than one level higher than his level.

3. The decision relating to the payment of SPA in this case has not been vitiated by bias or unfairness.

The Tribunal, having deliberated from 1 to 24 November 2004, now pronounces the following Judgement:

I. The JAB has found as a fact that the Applicant had assumed and discharged the duties of an Economic Affairs Officer at the P-4 level for the 25-month period, from 1 October 1993 to 1 November 1995. It likewise made a finding that the Applicant had assumed and discharged the duties of OiC, FADPPS, at the P-5 level from 15 September 1995 until 30 June 1996. Thus, the first six weeks of the second period overlap the former period.

In any event, there is really no issue but that the Applicant had been assigned duties at higher level posts for a continuous period from 1 October 1993 to 30 June 1996, and no contradictory evidence on these aspects had ever been offered by the Respondent.

II. Since the Applicant was at all material times a staff member of ECA at the P-3 level, he understandably claimed to be entitled to SPA for the periods during which he assumed the duties and responsibilities of the P-4 and P-5 posts, to be calculated in

accordance with the appropriate directives. PD/1/84/Rev.1 of 28 September 1990, entitled "Special post allowance", which governs the payments of SPA, provides that such payments are not normally payable until the beginning of the fourth month after the staff member has assumed the full functions of the higher level post. Whilst on the information provided by the Applicant there was an overlapping period from 15 September until 1 November 1995, when he was performing the duties of both the P-4 and P-5 posts, the Tribunal is satisfied that on a proper construction of PD/1/84/Rev.1 he would not be entitled to payment of more than one SPA for that period. It therefore matters little when he ceased performing the duties of the P-4 post, or when he assumed the duties of the P-5 level post, or whether, in fact, there was an overlap, as this would not have effected the ultimate calculation. The Tribunal is further satisfied that, following the provisions of PD/1/84/Rev.1, since the Applicant was firstly assigned the P-4 duties and secondly assigned to perform the P-5 level duties, these must be considered as distinct and different assignments, so that normally the first three months of each period would have to be discounted.

As found by the JAB, the Applicant's eligibility for payments of SPA was confirmed by his Division's request to grant him same, dated 25 November 1994 and a subsequent reminder dated 6 September 1995. However, in the view of the Tribunal, ECA's responses to these requests can best be described as vacillating, procrastinating and evasive. All sorts of obstacles were put in the way of making a decision and, when on 29 June 1999, a decision recognizing that the Applicant was entitled to SPA payments was ultimately made, it was decided that he would be paid only for the period 1 December 1995 until 30 June 1996. The reason given for declining to allow payments for the extended period was the alleged bar against retroactive payments.

In the opinion of the Tribunal this reason was, in the circumstances of this case, unconscionable and ought not have been invoked, since the delay in dealing with the issue, which thereby gave rise to the proposition that the requests for SPA were for retroactive payment, were caused by the dilatory manner in which the Administration had dealt with those requests.

III. The Applicant appealed to the JAB against the decision to deny him payments of SPA for other than the said seven-month period. His claim was resisted by the Respondent who, inter alia, sought to argue that the Applicant's claim (if it had merit) was extinguished by an MOU which the Applicant had signed on the occasion of his

retirement. According to the Respondent, in signing the said MOU, the Applicant had waived any such claim as he may have had against the Administration and he had also acknowledged that no further claims would be made. Here, again, the Tribunal considers that this submission was unconscionable. It is clear from the record that the parties had not contemplated that the Applicant's signature on this MOU would extinguish his then pending claim for SPA and the Administration must have appreciated, or ought to have appreciated, that it was considered, at least by the Applicant, as applying only to matters such as his separation benefits and matters of that nature. Had it been intended by the Administration that the Applicant should have been asked to waive his then outstanding claim for SPA, this should have been clearly indicated in the document he was asked to sign, for it was quite reasonable for him to assume, in the absence of it being mentioned, that the MOU related only to his retirement entitlements.

IV. The Tribunal has difficulty identifying the logic or rationale of the JAB's recommendation. The JAB recommended payment of SPA solely for the period from 1 July until 1 December 1995, apparently on the basis that there had been a gap between "the approval of the assumption and the performance of the functions" and on a finding that "the only evidence given for the approval of assuming the post, and therefore entitlement for SPA, was a Memorandum from ... [the] Chief of Personnel Section, to the Appellant, dated 17 March 1995". These assertions contradict what were findings of fact earlier made by the JAB itself and were neither supported by evidence nor contended by the Respondent. All available evidence was in the teeth of this finding. The Tribunal must conclude that it was some sort of compromise arrived at by the JAB so as to discount the Applicant's claim because they considered it should arrive at some sort of compromise recommendation for some un-stated reason.

The Respondent accepted the recommendations made by the JAB and has paid SPA to the Applicant as recommended. In the view of the Tribunal, since the recommendation of the JAB was neither rational nor reasonable in all of the circumstances, but was clearly a recommendation made arbitrarily and without a proper basis in fact, the Respondent's decision to act upon it must be considered to share the same infirmities.

V. The Tribunal fully appreciates that the payment of SPA is not a staff member's absolute entitlement and that under staff rule 103.11(b) and PD/1/84/Rev.1 the

Respondent possesses discretionary authority in this matter. This has also been confirmed by the Tribunal in its jurisprudence (See, for example, Judgement No. 1057, *Da Silva* (2002).) However, this is a *quasi* judicial discretion which cannot be exercised capriciously or arbitrarily. Since no rational or cogent reason has been advanced as to why the Applicant should not have received payment for any period other than from 1 December 1995 until 30 June 1996 (which was awarded to him by the Respondent on 29 June 1999) and from 1 July until 1 December 1995 (which was awarded to him following the recommendation of the JAB) and since no rational basis has been advanced for this refusal, nor can one be inferred from the record, the Tribunal is satisfied that the decision not to allow payment for any time outside these periods was not made as a result of a lawful or reasonable exercise of the Respondent's discretion.

The Tribunal therefore takes as a starting point that the Applicant would have been entitled to receive the balance of SPA due to him for the two periods between 1 October 1993 and 30 June 1996, less the three-month deduction from the first period and a further three-month deduction from the second period and having allowed credit for the sums paid by the Respondent to the Applicant. The payment should be calculated on the basis of the provisions of PD/1/84/Rev.1, paragraph 9 of which provides that "SPA is not normally payable at more than one level higher than that of the staff member". The Applicant claims that this is unfair in relation to the second period, when he was assigned the duties of OiC, FADPPS, which was a post at the P-5 level. However, the Applicant failed to identify any legal principle as to why the substance of the Directive in question should not apply, nor did he provide grounds for seeking an exception to it.

VI. The Tribunal wishes to reiterate its view that the assumption of higher level posts by staff members and the payment of SPA as compensation for doing so have always been considered to be a temporary arrangement. It is partly for this reason that the payment of SPA does not begin until the fourth month of assumption of the higher-level duties. It is likewise for this reason that SPA payments would not normally be for more than a year, as this would be ample time in which to conduct a proper promotion or placement exercise. Any other interpretation could lead to mal-administration, in either inappropriately promoting staff members through the "back door" or else expecting staff members to perform higher-level duties for an extended period of time,

while compensating them for performing these duties only for one year. The Tribunal is satisfied that this was not the intention of the Directive.

Having considered that the Applicant performed the duties of the P-4 and P-5 level posts for a total of 33 months, that he was paid SPA for a total of 12 months and having determined that a deduction of three months would have applied to each of the periods as explained above, the Tribunal finds that the Applicant should have been granted an SPA for an additional 15 months.

VII. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid compensation equivalent to SPA at the P-4 level at the rate in effect at the time of this Judgement for an additional period of 15 months; and

2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1211

Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1211

Case No. 1300: MUIGAI
No. 1314: MUIGAI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 27 March 2003, Teresa Wanjiru Muigai, a staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 June 2003, the Applicant, after making the necessary corrections, again filed an Application (the "first case") requesting the Tribunal to order, inter alia:

> "a) The nullification of the decision of the United Nations Secretary-General not to grant the Applicant the accrued annual leave totalling 76.5 days as of 31 December 1997 ...
>
> ..."

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2003 the time limit for the filing of an application in the "second case";

Whereas, on 22 July 2003, the Applicant filed an Application in the "second case" that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 October 2003, the Applicant, after making the necessary corrections, again filed an application in the "second case", requesting the Tribunal, inter alia, to

> "2. ...
>
> i) Find that the [A]pplication contains sufficient clarity and substance.
>
> ii) Find that the [A]pplication is receivable [and is] within the time limit [for] requesting ... compensation ...
>
> 3. ... [O]rder the award of compensation in the amount of US$ 2.7 million to the Applicant in damages for the abuse of due process and arbitrary treatment by the Respondent ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "first case" until 28 November 2003 and twice thereafter until 31 January 2004;

Whereas the Respondent filed his Answer in the "first case" on 13 January 2004;

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "second case" until 27 February 2004 and twice thereafter until 15 June 2004;

Whereas the Respondent filed his Answer in the "second case" on 27 May 2004;

Whereas the Applicant filed Written Observations in the "second case" on 10 August 2004;

Whereas the Applicant filed Written Observations in the "first case" on 23 August 2004 and the Respondent commented thereon on 9 September;

Whereas the statement of facts relevant to both cases, contained in the reports of the Joint Appeals Board (JAB) reads, in part, as follows:

> "[The Applicant] entered the services of the United Nations Environment Programme [(UNEP)] as [a] Secretary at the G-6 level in October 1973 and served on several fixed-term appointments ...
>
> ...
>
> [At the time of the events which gave rise to these Applications, the Applicant held a permanent appointment and was serving as Chief, Recruitment Unit, at the P-4 level.]

...

In February 1997 she was temporarily assigned to the Office of the Humanitarian Co-ordination in Iraq (UNHCI).

[On] 6 January 1998, [the Applicant] was informed of the Executive Director's decision to summarily dismiss her.

[On] 20 July 1998, [the Applicant] was informed of the Executive Director's decision to reinstate her [retroactively] effective 7 January ... and to place her on suspension with full pay, also effective 7 January ... pending investigations into allegations of misconduct against her.

[Thereafter, the Applicant's case was referred to the Joint Disciplinary Committee (JDC) in Nairobi. On 23 December 1999, the JDC issued its report concluding, inter alia, that the Applicant had 'successfully exonerated herself' of the allegations of misconduct which had been brought against her. The JDC recommended that no disciplinary measures be taken against the Applicant.]

[The Applicant] ... reported back to work on 3 April 2000. She is presently working in the secretariat of the Governing Council of UNEP."

Whereas the statement of facts pertaining to the "first case", as contained in the report of the JAB reads, in part, as follows:

"[On] 29 May 2000 ... the [Applicant] requested confirmation ... that she had accrued 60 days of leave for the period preceding 1 January 1998 [and had since accumulated an additional 60 days of leave].

[On] 8 June 2000, [Human Resources Management Service (HRMS), United Nations Office at Nairobi (UNON)] responded by rejecting this request citing staff rule 105.1 (c) whereby annual leave may be accumulated, provided that no more than 12 weeks of such leave shall be carried forward beyond 1 January of any year.

[On] 15 June 2000, the [Applicant] responded, arguing that staff rule 105.1 (c) would only be applicable in a normal working situation. Since she had been on 'unauthorized' summary dismissal/suspension from work during the period 1998/1999, her working situation could not be considered normal, since the Administration had placed her in a situation that prevented her from exercising her rights under staff rule 105.1. ... On the basis of these arguments, she again requested acknowledgement of accrual of annual leave.

[On] 19 June 2000, HRMS, UNON, reiterated its position.

[On] 7 July 2000, the [Applicant] responded and continued to argue her case.

[On 13] July 2000, HRMS responded in turn giving detailed reasons for its position and informing the [Applicant] that [subsequent to an inquiry by HRMS] the Rules and Regulations Unit at Headquarters had agreed with [this] position. ...

[On] 12 December 2000 ... the [Applicant] repeated her wish to have the accrued leave acknowledged. UNON addressed another inquiry to the Rules and Regulations Unit by memorandum dated 28 December ... The Rules and

> Regulations Unit responded by memorandum dated 25 January 2001 and reiterated its position that the [Applicant] was not entitled to carry forward any leave accumulated before 1 January 1998.
>
> This negative response was forwarded to the [Applicant] by memorandum dated 27 February 2001 ..."

On 23 March 2001, the Applicant requested the Secretary-General to review the administrative decision to deny her accrual of 76.5 days annual leave as an exception to staff rule 105.1.

On 19 June 2001, the Applicant lodged an appeal in the "first case" with the JAB in Nairobi. The JAB adopted its report on 10 September 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations:***
>
> ...
>
> The Panel is of the opinion that the *terminus a quo* for calculating the time limit for filing the request for administrative review and the subsequent appeal started to run with the Administration's first negative response of 8 June 2000, [or at the very latest], with the final response from HRMS ... dated 14 July 2000.
>
> The Panel ... concluded that the ... letter of 27 February 2001 was merely a confirmation of what had previously been communicated to [the Appellant] in July 2000. ... [T]he staff member's request for administrative review of 23 March 2001 and her subsequent appeal came almost seven months too late. ... Since the staff member has not presented any facts that would allow for the assumption that adherence to the time limits was 'beyond her control' ... the Panel has to assume that the present appeal is irreceivable.
>
> ...
>
> ***Recommendation***:
>
> In the light of the above considerations, the Panel recommends to the Secretary-General that the present Appeal be rejected".

On 20 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report in the "first case" to the Applicant and informed her that the Secretary-General had decided to accept the JAB's conclusion and, in accordance with its recommendation, to take no further action on her appeal.

On 18 June 2003, the Applicant filed the above-referenced Application in the "first case".

Whereas the statement of facts pertaining to the "second case" case, as contained in the report of the JAB reads, in part, as follows:

> "[On] 11 March 2001, [the Applicant wrote] to the Chief, Division of Administrative Services, UNON, ... [requesting] compensation for decisions taken in respect of her contractual status during the years 1994 to 1998. ...
>
> ...
>
> [On] 29 May 2001, the Chief, Division of Administrative Services, UNON, informed the [Applicant] that her request only contained a general narrative of events and lacked 'an exact identification of administrative decisions' which she believed [to] have resulted in [the] non-observance of her terms of appointment. In order for UNON to be able to conduct a procedurally correct review of her request for compensation, it was necessary for the [Applicant] to identify the specific administrative decisions which she alleged caused her grievance.
>
> The [Applicant] responded [on] 18 June 2001 [stating] that she had not requested ... review of an administrative decision because she truly believed that the 'good offices of the Chief, Division of Administrative Services, could effectively be used to negotiate for compensation'. She again requested [compensation.]
>
> The Chief, Division of Administrative Services, UNON, replied [on] 2 July 2001, stating that since the [Applicant] had not addressed an issue for which provisions under the Staff Rules of the United Nations exist, he was of the opinion that her request was not receivable for consideration under the existing rules and administrative issuances of the Organization."

On 8 July 2001, the Applicant requested the Secretary-General to review the administrative decision to deny her compensation in the amount of US$ 2.7 million.

On 30 September 2001, the Applicant lodged an appeal in the "second case" with the JAB in Nairobi. The JAB adopted its report on 12 November 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations***:
>
> ...
>
> ... It is the Panel's opinion that the appeal is not receivable because of insufficient clarity of grounds as presented in the appeals documentation by the Appellant.
>
> Moreover, and more importantly however, the Panel is of the opinion that the appeal is not receivable *rationae temporis*. ...
>
> Regarding events that took place before 1998 ... administrative decisions that might have violated the staff member's rights could and should have been challenged by her at the time. She chose not to appeal these decisions then, when she could have possibly achieved their reversal. Instead she waited for four years to seek redress regarding these decisions. There is no doubt in the

> Panel's mind that redress regarding decisions made before 1998 is excluded by the rules regarding time-limits for filing appeals.
>
> Regarding the administrative decisions surrounding her summary dismissal in January 1998 and her subsequent placement on suspension with full pay in July 1998, the Panel is of the opinion that the [Appellant] ... could have sought compensation regarding the summary dismissal immediately after her reinstatement from July 1998 onwards. She also could have addressed an appeal to the JAB regarding her prolonged placement on suspension with full pay any time after the third month on which she was so placed. She did not do so.
>
> Even if the Panel assumes ... that it could have possibly been difficult for her to seek redress successfully before the JAB at a time when disciplinary proceedings were pending against her and that it is at least arguable that she was only able to calculate the extent of her damage regarding the prolonged placement on suspension with full pay as from the date of her reinstatement, the latest point at which she could and should have submitted her appeal would have been the date of her reinstatement. This is also the *terminus a quo* from which the time limits have to be calculated. Since the Appellant was reinstated in March 2000, she should have submitted a request for administrative review latest in May 2000 and the subsequent appeal in July 2000. Instead she waited until one year after her reinstatement to initiate her compensation claim. And it was only in July 2001 that she submitted her request for administrative review. The Panel was therefore unanimously of the opinion that the present appeal is time-barred.
>
> ***Recommendation***
>
> In light of the above considerations, the Panel recommends to the Secretary-General to reject the appeal."

On 21 April 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report in the "second case" to the Applicant and informed her that the Secretary-General had accepted the JAB's conclusions and, in accordance with its unanimous recommendation, had decided to take no further action on her appeal.

On 28 October 2003, the Applicant filed the above-referenced Application in the "second case".

Whereas the Applicant's principal contentions in the "first case" are:

1. The Application is not time-barred. Between 14 July and 12 December 2000, the Applicant was involved in consultations and negotiations in an attempt to redress the issue of her annual leave. The *terminus a quo* is 27 February 2001.

2. Having been dismissed, and subsequently suspended from duty, the Applicant could neither have applied for, nor taken, annual leave.

Whereas the Respondent's principal contentions in the "first case" are:

1. The Application is time-barred.

2. The Applicant is not entitled to accrued annual leave.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Application is not time-barred. The various administrative decisions involved in this case were taken informally, making it difficult to justify an appeal to the JAB at that time; they "became facts" only through an investigation conducted by the Office of Internal Oversight Services and the JDC proceedings. The Applicant was not in a position to seek compensation until all the alleged charges against her had been dispensed by the JDC.

2. From the time of her reinstatement in April 2000, until July 2000, negotiations were on-going between the Applicant and the Administration in an attempt to agree on compensation.

3. The JAB erred in determining that the appeal lacked clarity. The Applicant's appeal to the JAB referred to specific administrative decisions which led to specific damages.

4. The Applicant was treated with bias and hatred since 1994.

Whereas the Respondent's principal contentions in the "second case" are:

1. The Application is time-barred.

2. The Applicant's rights of due process were not violated.

The Tribunal, having deliberated from 9 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant has brought before the Tribunal two different cases. In the "first case", she requests the Tribunal to rescind the Respondent's decision not to grant her accrued 76.5 days of annual leave; the "second case" concerns the Applicant's request for compensation of US$ 2,700,000 for administrative decisions taken in violation of her rights during the period from 1994 to 1998. Since the Applications concern different alleged wrongs, arising from different administrative decisions sufficiently related to each other to be considered jointly and without prejudice to the Applicant, the Tribunal will address them in the same Judgement. (See Judgement No. 1010, *Kanj* (2001).)

II. Having considered the two cases, the Tribunal finds them both to be time-barred, as explained below.

Staff rule 111.2 (a) provides that:

> "A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing."

Staff rule 111.2 (f) states that:

> "An appeal shall not be receivable unless the time-limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

In her "first case", the Applicant appeals the decision denying her accrued leave of 76.5 days as of 31 December 1997. The Applicant claims that as a consequence of the Respondent's decision of 6 January 1998 to summarily dismiss her from UNEP, she could not take these days as vacation within the mandatory four-month period following her return from mission assignment in Iraq, as per staff rule 105.1 (c).

The Tribunal notes that on 29 May 2000, the Applicant, for the first time, raised the issue of annual leave accrued prior to her summary dismissal. She did so when she requested confirmation that, as of 1 January 1998, she had a balance of 60 days of leave and that in the years 1998 and 1999, while on suspension from duty, she had accumulated a further 60 days. In response, she was informed that, in accordance with staff rule 105.1 (c), no more than 60 days of leave could be carried forward beyond 1 January of any year. The Applicant addressed the issue again, challenging this determination and contending that had the Administration respected her due process rights, this question would never have arisen. She therefore requested that an exception be made in her case to allow her to utilize her accrued annual leave in excess of 60 days. On 13 July 2000, the Applicant was informed that her request had been rejected. It was explained that such a request should have been made "before the end of the year in which the days would be forfeited" and, furthermore, the exceptional circumstances in which the carrying over of leave days in excess of 60 had been authorized was restricted to cases when exigencies of service prevented the staff

member from taking annual leave, which was not the circumstances of the Applicant's case. Five months later, on 12 December 2000, the Applicant addressed her request anew to the Chief, Division of Administrative Services, UNON. Her request was once again denied and, on 23 March 2001, she wrote to the Secretary-General requesting administrative review.

The Respondent contends that the Applicant failed to prove that exceptional circumstances existed which justified the delay in her request and that, therefore, her Application was time-barred.

III. The Applicant requests the Tribunal to find that the *terminus a quo* is 27 February 2001 "on the grounds of Common Law stand on 'fresh step' which provides for waiver in light of available new facts". The Tribunal does not accept this contention. Upon review of the file, it appears that the Applicant, upon receipt of the negative response to her request of May 2000, rather than initiating an appeals process, chose to seek repeated confirmation of what had been previously communicated to her by the Respondent. Moreover, the Applicant failed to provide a substantiated and convincing argument as to why, subsequent to her request having been rejected yet again on 13 July 2000, she remained silent for five months, until her renewed request of December 2000. It would seem that the Applicant might have realized that her time to initiate the appeals process had elapsed and thus chose to seek to revive her claim in this renewed request. In this regard, the Tribunal wishes to reiterate two points: a) once it is clear that a decision is made, the time for initiating the appeals process begins to run and, thus, further correspondence on the issue would normally not stop it from running; and, b) bringing up an issue on which a decision had previously been communicated to the staff member and which was not the subject of a request for administrative review does not normally start the process anew, *i.e.*, the Administration's response to the renewed request would not constitute a *new* administrative decision which would restart the counting of time. The Tribunal agrees with the Respondent's assertion on this point, that allowing for such a renewed request to restart the running of time would effectively negate any case from being time-barred, as a new letter to the Respondent would elicit a response which would then be considered a new administrative decision. The Tribunal furthermore wishes to reiterate that negotiations between the parties do not stop the time from running. While negotiations are to be encouraged, they do not in and of themselves necessarily suspend the time limits for initiating the formal proceedings.

The Tribunal considers that even on the basis of the "fresh step" theory, a required element is that there would be a new fact. It would be logical to expect that the new fact would have to be discovered, and subsequently brought forward, by the party requesting to benefit from the waiver of the time limit. In the present case, the Applicant suggests that the "new fact" is related to the statement made by the officer who issued the ruling in her case that he was not aware of her having been on mission immediately prior to her separation. However, the Applicant herself was fully aware of this fact, as well as of the provisions of the relevant Staff Rules. She therefore cannot benefit from the "fresh step" theory. In any event, the knowledge of this fact ultimately did not lead to any subsequent change in the decision. The Tribunal refers on this issue to the Administrative Tribunal of the International Labour Organization (ILOAT), which has repeatedly decided that when a decision is not changed, but subsequent actions or decisions are merely confirmation of the earlier decision, such subsequent action will not have the effect of delaying the time limits (ILOAT Judgements No. 329, *In re Quansah*, (1977); No. 413, *In re Over* (1980); and, No. 430, *In re Chamayou* (1980).) Therefore, the Applicant's letter of 12 December 2000 and the subsequent response of the Respondent cannot be considered as a "fresh step" to reopening the issue and to calculating the time-limits.

The Applicant further contends that the four-month period, during which staff members must utilize their accrued annual leave in order to avoid its forfeiture, as stipulated in staff rule 105.1 (c), had expired when she ceased to be a staff member upon her dismissal and she was therefore not able to utilize her accrued leave days. The Tribunal does not subscribe to this view.

Staff rule 105.1 (c) provides that:

> "Annual leave may be accumulated, provided that not more than twelve weeks of such leave shall be carried forward beyond 1 January of any year or such other date as the Secretary-General may set for a duty station. However, upon completion of service with a mission ... any accumulation of annual leave which otherwise would have become subject to forfeiture during the mission service, or within two months thereafter, may be utilized to cover all or part of an authorized period of post-mission leave. Any such leave which is not so utilized within four months following departure from the mission area shall be forfeited."

The Tribunal notes that the Applicant was summarily dismissed on 6 January 1998 and was retroactively reinstated and *placed* on suspension with full pay on 20

July 1998. During this six-month period, and particularly upon receipt of her final entitlements upon separation, such as her last salary, she should have requested that the value of her accumulated 60 days of annual leave be paid to her. Had the Administration declined then to pay her for these days, she should have initiated proceedings challenging that decision. There is no indication that the Applicant addressed this issue at that time. Moreover, the Tribunal is of the opinion that there was nothing to prevent the Applicant from utilizing these accrued annual leave days after she was retroactively reinstated and placed on suspension with full pay, as from 7 January 1998. The letter whereby the Applicant was reinstated and placed on suspension, clearly indicated that the suspension would be without prejudice to her rights and would not constitute a disciplinary measure. Bearing in mind that a staff member on suspension is expected to be available for service when called, the Applicant could have utilized these accrued leave days within four months of her reinstatement. Furthermore, while suspended, the Applicant could have requested an extension of the time in which to utilize these accrued days, and she could also have requested that an exception be made to the 60-day limit as stipulated in staff rule 105.1 (c). The Applicant waited more than two years before submitting any such request.

In light of all the foregoing, the Tribunal concludes that the Applicant's request for accrued annual leave days in excess of the allowed 60 days is time-barred.

IV. The Tribunal will now turn its attention to the Applicant's "second case", concerning her request for compensation in the amount of US$ 2,700,000 in respect of violations of her contractual rights between 1994 and 1998. The Tribunal notes that the Applicant first requested compensation in a letter addressed to the Chief, Division of Administrative Services, UNON, on 11 March 2001. In her letter, the Applicant presented a series of events which allegedly caused her injury. The JAB found that in her appeal before it, the Applicant did not identify specific administrative decisions, nor did she link any "decision" with specific damage. The JAB therefore concluded that the appeal was irreceivable, as it was lacking in clarity of the grounds on which it was based. The JAB also found that the appeal was time-barred.

As explained below, the Tribunal concurs with the JAB that this case, like the first one, is time-barred. It therefore does not find it necessary to address the issue of clarity of grounds invoked.

V. The Applicant initiated her claim for compensation in respect of events that took place during the period 1994-1998, in March 2001. Her request for administrative

review was filed in July 2001. In keeping with staff rule 111.2, the Applicant should have requested administrative review within two months of the allegedly damaging decisions. As correctly stated by the JAB, "regarding events that took place before 1998 ... decisions that might have violated the staff member's rights could and should have been challenged by her at the time". The Tribunal has rigorously maintained the importance of complying with the mandatory time-limits set out in the Staff Rules. In Judgement No. 498, *Zinna* (1990), the Tribunal held that "the various time-limits provided in the Staff Rules are to ensure that remedies are sought from contested administrative decisions in a timely and proper manner". In Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal emphasized that

> "it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations."

Accordingly, the Tribunal finds that the Applicant's claims arising from events which took place prior to 1998 are not receivable.

VI. As for the Applicant's claims arising from her dismissal and suspension in 1998, the Tribunal is of the opinion that these too are time-barred. The JDC report was issued on 23 December 1999 and the Applicant was subsequently reinstated in March 2000. At the very latest, the Applicant should have initiated her proceedings with regard to compensation within two months of her reinstatement, *i.e.*, by the end of May 2000. However, the Applicant waited more than a year and submitted her request for administrative review only in July 2001.

The Applicant argues that she was fully involved in negotiations with the UNON administration up to 2 July 2001 and that immediately after finalizing negotiations, she requested administrative review, on 8 July. However, once again, the Applicant's argument must fail, since, as previously explained, negotiations do not necessarily "stop the clock from ticking". Moreover, the Applicant failed to provide the Tribunal with convincing evidence in support of her claim of receivability. Unfortunately for the Applicant, in waiting for over one year to request compensation, she had missed her opportunity.

VII. In view of the foregoing, the Tribunal, although sympathetic with the Applicant, finds that both Applications are time-barred and therefore rejects them in their entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1212

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1212

Case No. 1301: STOUFFS Against : The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Dayendra Sena Wijewardane;

Whereas, on 16 July 2003, Nadejda Stouffs, a former staff member of the United Nations, filed an Application containing pleas which read as follows:

"**PART II. PLEAS**

1. I contest the final decision of the Secretary-General ... in which he declines to follow the recommendations contained in the report of the Geneva [Joint Appeals Board (JAB)].

I ask the United Nations Administrative Tribunal a) to rescind the Secretary-General's decision, b) to endorse the recommendations of the [JAB] and c) to order the United Nations Office at Geneva [(UNOG)] to pay the sums overdue and the appropriate interest thereon at the rate of 8 per cent a year from ... the date of my retirement. ...

2. I ask to be awarded damage compensation for injury resulting from the failure of [UNOG] to abide by Staff Rules and Regulations, non-observance of language teachers' contract conditions and delay of payment of a) pension benefits ..., b) the final pay for the period from 1 - 7 April 2000 ..., c) annual leave pursuant to staff rule 105.1 ... I also ask for the appropriate interest at the rate [of] 8 per cent a year, on these three delayed payments.

3. I ask for the reimbursement of expenditures incurred in the preparation of the [appeal] to the Geneva JAB and in the preparation of this [Application] to the Administrative Tribunal, including clerical costs, photocopies, telephone calls and postal expenses, in an amount of approximately CHF 500 plus appropriate interest thereon.

4. I request, pursuant to article 7, para. 3 (e) of the Rules of the Unit Nations Administrative Tribunal, addit.onal relief, including reasonal attorney's costs."

Whereas at the request of the Respondent, the President of the Tribu granted an extension of the time limit for filing a Respondent's answer until November 2003 and periodically thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 30 April 2004;

Whereas the Applicant filed Written Observations on 28 September 2004;

Whereas the statement of facts, including the employment record, contained the report of the JAB reads, in part, as follows:

"**Introduction**

...

[Applicant's] Professional Record

... The [Applicant] entered the service of the United Nations in Geneva, on January 1978, as a Russian teacher in the Training and Examination Sectio on a contract covering the first term of the year ... [Her contract w subsequently renewed.]

... She received a permanent appointment on 1 January 1990.

... She went on retirement as of 7 April 2000.

...

Summary of Facts

...

... On 27 March 2000, in a memorandum to [a] Personnel Officer, t [Applicant] notably highlighted the alleged 'precedent established by t treatment accorded to two staff members who retired in 1989 and 1998, w full leave entitlement'.

... By memorandum dated 3 April 2000, the Chief, Human Resourc Management Service, UNOG, [(HRMS)] answered that '[she was] unable meet [the Applicant's] expectation to be paid for the Easter recess, i.e. until April 2000, [as the latter] would have separated from the Organization on April 2000'. She wrote *inter alia*:

> 'In order to clarify the matter I wish to reiterate that the provisions Administrative Instruction] ST/AI/316 [entitled "Granting of Status Staff Members to Full-time Language Teachers"] of 6 March 198 reproduced as *Geneva/01/157, and Amend.1* remains in effect. T important aspect of this instruction is the granting of the status of st members to full time language teachers under the 100 series of St Rules. The leave entitlement of full time language teachers remai unchanged in accordance with paragraph 3 *for as long as they ha status of staff members*. Once a staff member separates from servi

> he/she ceases to have the status of a staff member effective the date of separation.'

...

[On 30 April 2000, the Applicant returned her unsigned Personnel Payroll Clearance Action Form (P.35 form), to the Chief, HRMS, indicating that she would not sign the form until her leave balance had been included.]

... On 29 May 2000, [the Applicant] reminded the Chief, [HRMS], about her previous request in order 'to take appropriate steps to obtain [her] final payment'.

... On 31 May 2000, the [Applicant] wrote to the Secretary-General requesting him to review the decision by the Administration not to accord her a pro-rata amount of paid leave prior to her retirement effective on 7 April 2000 ...

...

[On 1 August 2000, the Chief, HRMS, urged the Applicant to sign her P.35 form, in order that the P-35 form could be released. The Chief proposed that the Applicant sign the form "without the leave days included", and advised that "signing [her] P-35 [was] not an indication that [she agreed] to the non inclusion of leave days". The Applicant did not sign the form.]

[On 24 August 2000, the Applicant lodged an appeal with the JAB in Geneva.]

[On 5 September 2000, HRMS advised the Applicant that her unsigned P-35 form had been released "for pension purposes only".]

...

... On 12 September 2000, the Chief, Rules and Regulations Unit, OHRM, New York, answered to the Chief, Human Resources Management Service, UNOG, on the request made by the [Applicant] that she be paid not only for accrued annual leave, but also for additional days corresponding to the scheduled break between the terms she had just completed and the beginning of the next term. She wrote *inter alia*:

> 'As of the date [of retirement], the separating staff member is entitled to payment of any annual leave accrued under 105.1, up to a maximum of 60 days, in accordance with staff rule 109.8. This is not altered by the fact that, under special conditions of service set out in Appendix F, teachers work only for 3 terms of 13 weeks during the year. Leave taken during the summer recess and the scheduled breaks in excess of the normal annual leave entitlement is treated as special leave with pay.'

... The above-mentioned answer was transmitted to the [Applicant] on 14 September 2000, who was informed that she was entitled to 'payment of annual leave accrued for the period 1 January 2000 through 7 April 2000, i.e. 8.5 days', minus 3 days of annual leave taken in January.

... By letter dated 2 October 2000 to the Chief, Rules and Regulations Unit, New York, the [Applicant requested the payment of her final entitlements in accordance with] staff rule 105.1.

... On 10 October 2000, ... the [Applicant] contested the decision transmitted to her on 14 September 2000, based on a calculation method, established itself on assumed 'incorrect facts furnished by UNOG Administration'."

The JAB adopted its report on 28 June 2002. Its considerations, conclusions and recommendations read, in part, as follows:

"**Considerations**

...

37. With regard to the Appellant's argument referring to two alleged precedents, the Panel wished to specify that only three language teachers have retired since 1984, and that none of them received any paid days of annual leave or were kept on board on purpose until the end of a break following a term.

...

42. ... [T]he Panel agreed with the position of the Chief, Rules and Regulations Unit, OHRM, who stated that as staff members, language teachers are entitled to payment of accrued annual leave. Based on paragraph 40, the Panel was of the view, however, that the provisions of staff rule 105.1 in conjunction with staff rule 109.8, namely that the payment of annual leave accrued under staff rule 105.1 is limited to a maximum of 60 days (staff rule 109.8), does not apply to language teachers, given their specific contractual arrangements.

43. It highlighted that although staff members, language teachers have *de facto* 13 weeks of annual leave, i.e. 5.5 days a month, contrary to other staff members who are granted 6 weeks of annual leave, i.e. 2.5 days a month. This disparity is reflected by a corresponding proportional difference between the amounts of average ... salaries ...

...

Conclusions and Recommendations

45. In view of the foregoing, the Panel **concludes** that the Appellant, as staff member, is entitled on separation to the amount corresponding to the accrued annual leave from 1 January 2000 to 7 April 2000, date of her retirement, taking into account the fact that language teachers have 5.5 days per month of annual leave, and that the Appellant took 3 days at the beginning of January.

46. Hence, the Panel **recommends** to the Secretary-General that the Appellant be granted the equivalent amount of 15 days of annual leave, in compensation of the annual leave she did not take and to which she is entitled.

47. The Panel also **recommends** that this calculation method, based on Administrative Instruction ST/AI/316 ..., be implemented to all language teachers who separate from the Organization before the end of the calendar year, i.e. 31 December of each year."

On 12 February 2003, the Applicant received her final salary from the Organization. According to the Respondent, payment was effected, notwithstanding the lack of a signed P-35 form, "for humanitarian reasons".

On 17 April 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "The Secretary-General regrets that he cannot agree with the JAB's view that leave taken by language teachers in excess of the annual leave entitlement provided for in the Staff Rules constitutes annual leave. In that regard, he points out that Appendix F to the Staff Rules expressly provides that such leave is treated as special leave with pay, *not* annual leave. Accordingly, the Secretary-General cannot accept the JAB's conclusions that the payment of annual leave to language teachers should not be limited to a maximum of 60 days, or that you were entitled to 15 days of annual leave for which you should be compensated. The Secretary-General has decided to maintain the contested decision and take no further action on your appeal."

On 22 May 2003, the Applicant was paid her annual leave balance of a total of 5.5 days, in accordance with the Secretary-General's decision.

On 16 July 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB correctly calculated the language teachers' annual leave as 5.5 days per month. The Applicant is entitled to payment on this basis, with interest at 8 per cent.

2. UNOG violated the Staff Regulations and Rules and the contracts held by the language teachers.

3. The Applicant should be compensated for the material and moral injury occasioned by the Organization's delay in paying her final salary, leave entitlements and pension.

4. The Applicant is entitled to an award of costs and legal expenses.

Whereas the Respondent's principal contentions are:

1. Leave during the summer recess and scheduled breaks between the three terms included in the language teachers' yearly work schedule, in excess of the annual leave entitlement provided in the Staff Rules, does not constitute annual leave.

2. The Administration did not violate the Staff Regulations and Rules or the language teachers' contracts.

3. The Applicant's claims for damages and the award of costs are without merit.

The Tribunal, having deliberated from 29 October to 24 November 2004, now pronounces the following Judgement:

I. This case contests a decision of the Secretary-General dated 17 April 2003, concerning the method used to calculate the annual leave of language teachers. According to that decision, leave during the summer recess and scheduled breaks between the three terms included in the language teachers' yearly work schedule, in excess of the annual leave entitlement provided in the Staff Rules, does not constitute annual leave.

II. The Applicant entered the service of the UNOG on 16 January 1978, as a Russian teacher in the Training and Examination Section on a fixed-term contract. Between 1978 and 1989 she was granted a number of further fixed-term contracts in the same post. The Applicant received a permanent appointment on 1 January 1990. The Applicant's date of retirement was 29 February 2000 but her appointment was extended until 7 April 2000. On 27 March 2000, the Applicant requested payment of the pro-rata amount of paid leave prior to her retirement which corresponded to the three months of the winter term 2000 (10 January - 7 April). The request was turned down by the Administration in a memorandum dated 3 April 2000. On 24 August 2000, the Applicant lodged an appeal with the JAB, which declared in her favour and awarded her the pro-rata amount of paid leave. When the Secretary-General rejected the recommendation of the JAB, the Applicant appealed to the Administrative Tribunal.

III. On the one hand, the Applicant contests the Secretary-General's submission that the leave of language teachers during the summer recess and scheduled breaks between terms, in excess of the annual leave entitlement provided for in the Staff Rules, is treated as "special leave with pay" and not as "annual leave", and requests the Tribunal to order the United Nations to pay the sums overdue. Pursuant to staff rule 105.1, staff members shall accrue annual leave at the rate of six weeks of annual leave a year, i.e., 2.5 days per month. Nonetheless, Appendix F expressly states that the yearly schedule of work of language teachers consists of three terms of 13 weeks each; consequently, they have *de facto* 13 weeks of leave. The Applicant maintains that, in accordance with Appendix F of the Staff Rules and with General Assembly resolution 38/234 of 20 December 1983 concerning, inter alia, the contractual status of language

teachers, any leave taken during the 13 weeks of breaks constitutes annual leave. Indeed, she claims that the seven weeks in excess of the annual leave provided for in the Staff Rules must also be classified as such. In her opinion, language teachers are entitled to 5.5 days of annual leave per month as opposed to the 2.5 days per month granted to other staff members of the United Nations. The Applicant contends that this disparity is reflected by a corresponding proportional difference between the amounts of average salaries per annum of the two categories of United Nations personnel, with language teachers receiving a lower salary. The Applicant claims, therefore, that at the time of her separation, she was entitled to compensation for 15 days of annual leave accrued during the period January to April 2000 (having taken three days of leave in January 2000).

IV. What then is the basis for the Applicant's claim, as a language teacher, to seven more weeks of annual leave than other United Nations staff members? Appendix F of the Staff Rules provides as follows: "There is a summer recess and there are scheduled breaks between terms. Leave taken during the recess and the breaks in excess of the annual leave entitlement provided in the Staff Rules is treated as special leave with pay."

The Applicant claims that Appendix F of the Staff Rules does not state that leave taken during the summer recess and the scheduled breaks in excess of the annual leave entitlement provided for in the Staff Rules *does not constitute annual leave*. It is her contention that, on the contrary, Appendix F specifies that "teachers are entitled not only to the annual leave provided by [the] Staff Rules but also to leave between recess and breaks". The Applicant contends that this latter type of leave is defined as annual leave in A/C.5/38/41, "Contractual status of language teachers", of 18 November 1983, as approved by General Assembly resolution 38/234. Paragraph 20 of A/C.5/38/41 stipulates:

> "Their [language teachers] conditions of service would be covered in a new appendix to the Staff Rules to reflect their yearly schedule of work as compared to that of other United Nations staff, the annual leave in excess of their entitlement under the Staff Rules being treated technically as leave with pay."

V. In analysing the Applicant's claims, the Tribunal recalls, firstly, staff rule 105.1 whereby "staff members shall accrue annual leave while in full pay status at the rate of six weeks a year". The Tribunal declares that the problem lies in the interpretation of Appendix F and the Secretary-General's proposals in A/C.5/38/41 as

approved by General Assembly resolution 38/234 concerning the specific issue of language teachers' leave.

VI. Regarding the interpretation of Appendix F, the Tribunal, in agreement with the Respondent's position, considers that the provision in Appendix F clearly indicates that leave taken during the summer recess and the scheduled breaks between terms, in excess of the annual leave entitlement provided for in the Staff Rules, is treated as *special leave with pay*. Consequently, the Applicant's claim that this provision indicates that language teachers are entitled to both (normal) annual leave under the Staff Rules and (special) annual leave taken during the summer recess and scheduled breaks between terms, since the provision does not expressly stipulate that the latter type of leave is not annual leave, has no basis in law.

VII. By the same token, the Tribunal considers that A/C.5/38/41 clearly provides that language teachers' leave taken during those breaks, in excess of the six weeks of annual leave provided for in the Staff Rules, must be considered special leave with full pay and not annual leave. While the Applicant draws attention to the terms "annual leave" and "treated technically as" used in that text as meaning that such leave qualifies as "annual", the Tribunal considers it to be a semantic interpretation submitted by the Applicant which does not take account of the circumstances in the case and the teleological approach. Had the General Assembly intended for such leave to be treated as annual leave, it would have clearly indicated this. If such had been the case, it would have had to address other issues affected by that classification, for example, it would have had to decide whether language teachers would be entitled to accrue such leave and whether they would be entitled to receive pro-rata payment of such accrued leave in accordance with staff rule 109.8. Given that none of these issues was mentioned in the report of the Secretary-General or in the General Assembly resolution approving that report, the Tribunal considers that the leave in question was not intended to constitute annual leave.

VIII. On the other hand, the Applicant requests the Tribunal to consider the Administration's responsibility for the delays in processing her final entitlements at the time of her retirement from the United Nations on 7 April 2000, which had been prejudicial to her. Her claim is that the payments of her pension, final salary and accrued annual leave pursuant to staff rule 105.1 were delayed in violation of the Staff Regulations and Rules and the language teachers' contract. The Applicant also claims

that the delay "amounts to an abuse of authority" and that the particular circumstances in this case

> "manifest a consistent pattern of arbitrariness and a concerted effort on the part of the Administration to take advantage of [the Applicant's] dependence on regular monthly payments, with the aim to force [her] to forego [her] rights or suffer the considerable inconveniences of prolonged absence of any income".

She therefore requests that she be awarded compensation for the injury incurred and the appropriate interest thereon at the rate of 8 per cent a year on those three delayed payments.

IX. In defence, the Respondent submits on the subject of payment of the Applicant's final entitlements that the Administration acted in accordance with administrative instruction ST/AI/155/Rev.2 of 31 August 1990, entitled "Personnel Payroll Clearance Action". This Instruction requires the staff member to recognize, by signing personnel payroll clearance action form P.35, that he or she has received a copy of that Instruction and has duly noted the content of section I of the form before any payment can be made in his or her favour. The Respondent points out that the Applicant refused to sign the form, so that payments of her pension and other outstanding amounts could not be processed sooner.

X. In evaluating the Applicant's claim, the Tribunal will take account of ST/AI/155/Rev.2. The Instruction sets out the guidelines and procedures to be followed when a staff member retires in order to ensure that all outstanding obligations, liabilities and entitlements of the staff member have been properly recorded and settled. Paragraph 3 stipulates that "[t]he standard form used in the implementation of the procedures under reference is the personnel payroll clearance action form P.35". The provisions of the Instruction, notably paragraphs 11, 12 and 13, specify the staff member's obligations and those of the Organization with regard to the P.35 form. The Tribunal notes that the fact that staff members are required to sign their completed P.35 form is a logical fulfilment of those obligations. A staff member's signing of the P.35 form is therefore a prerequisite for the settlement of his or her entitlements upon retirement. Since the Applicant refused to sign the form, the Tribunal upholds the Respondent's claim that the Administration was justified in refusing to make such payments.

XI. Nevertheless, the Applicant also complains that the P.35 form she was given "had no indication of accrued annual leave [she was] entitled to under staff rule 105.1, no date and no signature of the Administrative Officer" and that, therefore, "the P.35 form was improperly recorded, inaccurate and incomplete". The Tribunal observes, on the one hand, that the staff member's disagreement with the content of the form does not exempt her from the general obligation to sign it in order to be able to receive the benefits deriving from her service with the United Nations. On the other hand, the Tribunal emphasizes that the staff member's signature does not deprive her of the possibility of challenging a contested component of its content or pursuing her action. The Tribunal points out that the Administration must ensure that a staff member's signing of the P.35 form is not considered as the signing of a general release from the Organization's obligations towards the staff. It is in the interest of the United Nations to protect the rights and interests of its staff and to process their benefits promptly and effectively. The Tribunal notes that it was in that spirit that the Administration eventually made certain payments in the Applicant's favour for "humanitarian reasons" without her having signed the form. Although the Tribunal considers the delays regrettable, it finds that they were caused by the Applicant's actions and that no compensation is therefore due to her.

XII. In conclusion, regarding the Applicant's contention that the delay in the payments of her pension, final pay and accrued annual leave "amounts to an abuse of authority", the Tribunal declares that the burden of proving that abuse of authority, bias, arbitrariness or other improper motivation or extraneous factors prompted the decision, lies with the Applicant. One may cite, as an example, the case of *Fagan* (Judgement No. 554, 1992), in which the Tribunal ruled as follows:

> "Accordingly, an Applicant alleging that a discretionary administrative decision is tainted by prejudice or improper motivation must adduce convincing evidence. The Tribunal concurs with the JAB's conclusion that the Applicant has not discharged the burden of proving discrimination, unfairness or improper motivation ..." (para. 11).

The Tribunal notes that the Applicant has not adduced evidence in support of her contention of abuse of authority, arbitrariness of the decision or any other improper motivation in the case.

XIII. Lastly, the Applicant has not successfully discharged the burden of proving improper action on the part of the Administration. Indeed, she has not convinced the Tribunal that the Administration violated her rights in any way whatsoever.

XIV. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Brigitte **Stern**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Secretary

United Nations AT/DEC/1213

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1213

Case No. 1302: WYSS Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Brigitte Stern, Vice-President; Mr. Dayendra Sena Wijewardane;

Whereas at the request of Elisabetta Wyss, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2003 and twice thereafter until 31 July 2003;

Whereas, on 11 July 2003, the Applicant filed an Application containing pleas which read, in part, as follows:

> "**I. Pleas**
>
> ...
>
> 1. The Applicant respectfully requests the Tribunal to order the ... Administration to produce ...documents ...
>
> ...
>
> 2. The Applicant hereby requests an oral hearing, ...

B. ***Redress Sought***

3. The Applicant respectfully seeks:

a. An order declaring the present new policy rules invalid and that the former policy rules will remain in effect until replaced with legally valid rules;

b. In the alternative, an order permanently annulling that portion of the new policy rules which provide for the automatic conversion of fixed-term appointments into indefinite appointments, and that portion of the new policy rules equating rights of those staff members within [the United Nations High Commissioner for Refugees (UNHCR)] who were granted 'new' indefinite appointments with those staff members possessing 'old' indefinite appointments;

c. An award of legal fees and costs incurred in the amount of USD 7,500;

d. An award of moral damages in the amount equal to two years of [the] Applicant's net annual salary;

e. Such other relief which the Tribunal feels is equitable, necessary and justified, including but not limited to any relief which the [Tribunal] can fashion to put the Applicant back in the same position vis-à-vis the job security she possessed before the attempted implementation of the new policy rules".

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 7 November 2003 and periodically thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 30 April 2004;

Whereas the Applicant filed Written Observations on 30 July 2004;

Whereas, on 23 November 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"***[Applicant's] Professional Record***

... The [Applicant] entered the service of ... UNHCR, Geneva, on 9 September 1974, as a clerk/typist, at the GS-2 level. Her short-term contract was extended several times until 1 June 1975, when she was granted a one-year fixed-term appointment as a bilingual typist/clerk ... at the G-3 level ... This appointment was [subsequently] renewed ...

... As of 1 January 1978, [the Applicant] holds an 'indefinite appointment'. She is currently assigned to the Bureau for Central Asia, South West Asia,

North Africa and Middle East (CASWANAME), at the GS-7 level, on a post of secretary.

...

Summary of Facts

...

... On 2 July 1999, through an Inter-Office Memorandum/Field Office Memorandum (IOM/FOM) N° 65/1999, the High Commissioner informed all staff members at Headquarters and in the field about a new policy in human resources management on contracts, postings and promotions, to become effective on 1 January 2000.

... By another IOM/FOM N°82/1999 dated 23 August 1999, the Director, Division of Resource Management, UNHCR, Geneva, ... provided all staff members at Headquarters and in the field with ... further information about the new ... policy ...

... On 20 December 1999, the [Applicant] wrote to the Secretary-General requesting him to review 'the decisions taken by [UNHCR] beginning on 2 July 1999, purporting to institute a "New Policy Framework for Postings, Promotions and Contracts" at UNHCR'.

... The same day, the [Applicant] also submitted a request to the ... JAB [in Geneva]for suspension of action of the implementation of the policy.

...

... In its report dated 30 December 1999, the JAB Panel entrusted with the consideration of the request for suspension of action recommended that the request be rejected on the basis that it found no evidence ... to prove that 'this new policy would directly or irreparably injure the [Applicant's] rights as staff member', and that it found that 'the said policy does not affect the [Applicant's] terms of employment ...'.

... [On] 4 January 2000, ... the Secretary-General [advised the Applicant that he had accepted] the Panel's recommendation.

... On 24 March 2000, the [Applicant lodged an appeal on the merits with the JAB.]

..."

The JAB adopted its report on 27 May 2002. Its conclusions and recommendations read, in part, as follows:

"***Conclusions and Recommendations***

52. For the foregoing reasons, the Panel concludes that the appeal is **not admissible** for the reason that it is time-barred and subsidiarily for the reason that the constitutive element for an appeal to be receivable is lacking: there is no administrative decision that the Appellant could have contested.

53. In view of its conclusion, the Panel finds that there is no valid basis for entering further into the merits of the case.

54. Consequently, the Panel unanimously recommends to the Secretary-General to reject the present appeal."

On 31 October 2002, the High Commissioner informed all UNHCR staff members of the decision to freeze the issuance of indefinite contracts to newly recruited staff members, effective 1 November 2002.

On 2 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had decided to accept the JAB's unanimous recommendation and to take no further action on her appeal.

On 11 July 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in determining that the Applicant's appeal was time-barred and in not identifying an "administrative decision". The Applicant appeals the implementation of the new policy rules, which became effective as of 1 January 2000. The Applicant requested administrative review on 20 December 1999, well within the time limits for initiating the appeal process.

2. The increased number of staff members entitled to "indefinite" appointments constitutes a threat to the acquired rights and job security of many staff members, including the Applicant.

3. The promulgation of the new policy rules was *ultra vires* and procedurally flawed.

4. The new policy rules violate the Applicant's rights under the principle of equal treatment by putting her at risk of termination while other United Nations general service staff holding the same type of appointment will retain the benefit of owning an indefinite appointment without similar risk of separation in the event of a staff reduction.

Whereas the Respondent's principal contention is:

The JAB properly concluded that the Applicant's request for administrative review by the Secretary-General of the contested decisions was time-barred and therefore not receivable.

The Tribunal, having deliberated from 1 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant challenged before the JAB the implementation of new policy rules promulgated by UNHCR, which became effective as of 1 January 2000. Having considered the case, the JAB determined that it was irreceivable and the Secretary-General accepted the JAB's recommendation to reject it. It is this decision that the Applicant appeals.

II. The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits.

The essential element of an appeal is that there is a contested "administrative decision". The Applicant contends that the contested decision is a set of new rules which entered into force in 2000 and which, according to the Applicant, could potentially cause her injury if a Reduction in Force (RIF) exercise was to take place some time in the future. The Applicant claims that under the former rules, her status as the holder of an indefinite appointment provided her with employment security, which the new rules impinge upon. The Tribunal has recently addressed the issue of what constitutes an administrative decision in its Judgement No. 1157, *Andronov* (2003) as follows:

> "There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions."

III. Following its ruling in *Andronov* (*ibid.*), the Tribunal finds that in this case there is no appealable administrative decision, as the new rules cannot be considered as such and, therefore, the case is irreceivable *ratione materiae*.

The Tribunal notes that in support of her Application, the Applicant refers, inter alia, to ILOAT Judgement No. 1852, *in re Macchino Farías* (1999), in which the ILOAT was seized with a similar matter. Whilst the Applicant chose to only partially cite that decision, the ILOAT complete ruling was as follows:

> "1. ... [I]t is clear ... from the ... submissions ... that [the complainant's] aim was to prevent the repeal of the former Combined Rules and Local Staff Regulations by the new Local Staff Regulations as of 1 January 1998.
>
> 2. The complainant does not identify any ... decision which affects him directly. He seeks only to prevent the enforcement of the new Regulations, apparently from fear that their application might affect his acquired rights.
>
> 3. Manifestly, the complaint is irreceivable. The Tribunal's case law is consistent to the effect that a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him. This is a general attack which is not tied to any particular application of the impugned rules to the complainant. It will not therefore be considered by the Tribunal."

It is thus evident that the ILOAT's ruling does not support the Applicant, as it is consistent with the approach adopted by this Tribunal as concerns what is to be accepted as an appealable decision.

Moreover, following the logic of the quoted ILOAT judgement and the jurisprudence of this Tribunal, an appealing staff member must demonstrate that he/she suffered some injury as a consequence of the violation of his/her terms of employment, manifested through the contested decision. (See Judgement No. 1220, *Araim* (rendered during this session).) In the present case, the Applicant has not convincingly argued the existence of any specific and concrete damage to her rights or terms of employment. She maintains that, formerly, the reduction of personnel would start with those staff members serving on fixed-term contracts, and that now she was effectively placed in the same category as them. It seems to the Tribunal that the Applicant only had a false sense of security, because when the Administration decides on reduction of personnel, additional criteria are involved, such as the performance record of the personnel concerned and the length of service with the Organization. In any event, the Applicant does not claim to have been the object of any RIF, and what she refers to as damage, at worst, is actually only a risk. Risk is not equivalent to damage and cannot be substituted for it. Had the Administration carried out an RIF exercise and had the Applicant's appointment been terminated as a result thereof, she could then have brought her case, arguing that she was selected for termination because of the new rules and the resulting large number of holders of new indefinite appointments had

caused her to be selected for termination. She would still have had to overcome the burden of proving that the new rules violated her rights, but that is not the issue at hand. Unless the Applicant can demonstrate injury caused to her as a result of a specific decision, her case remains one of seeking an "advisory opinion" which is outside of the Tribunal's jurisdiction.

IV. The Applicant contends that she had a right to have her case decided on its substantive merits and that rejecting her case on a procedural aspect violated her rights. The Tribunal is puzzled by this assertion. Procedural aspects of the law and the obligation upon parties to comply with them have been recognized by all legal systems, and this Tribunal is no exception, as stated in its Judgement No. 1106, *Iqbal* (2003):

> "The Tribunal reiterates the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization."

The requirement that an appeal be receivable, and the Tribunal's insistence thereon, cannot be considered as being in violation of a staff member's rights. Rules of procedure have the same legal value as substantive rules and should, therefore, be respected and not be dismissed or undermined for being "only" procedural. Many cases have been adjudicated by many different courts following many different legal systems on the basis of procedure. Substance in those cases would have been deemed to have given way to form. The present case is another such case and the Applicant's contention in this regard is rejected.

V. Lastly, the Tribunal notes that in its report, the JAB concluded that the case was irreceivable based on two grounds: *ratione temporis* and *ratione materiae*. The Tribunal assumes that the JAB's intention was to state that, had the case not been irreceivable *ratione materiae*, and had there in fact been an appealable administrative decision, it would have still found the case to be irreceivable *ratione temporis*. Otherwise, the JAB's reasoning would have an internal contradiction, since it would simultaneously include a finding that the appeal was invalid because there is no decision and because the appeal process was initiated without the two-month period from the date of the (non-existent) decision, in violation of staff rule 111.2(a).

VI. In view of all the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio **Barboza**
President

Brigitte **Stern**
Vice-President

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1214

Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1214

Case No. 1303: SAM-THAMBIAH Against: The Secretary-General of the International Seabed Authority

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Ms. Jacqueline R. Scott;

Whereas, on 4 July 2003, Nithi Sam-Thambiah, a former staff member of the International Seabed Authority (hereinafter referred to as ISA or "the Authority"), filed an Application containing pleas which read as follows:

"II PLEAS

(a) the Applicant ... requests the Authority to provide the following documents:

...

(b) Decision contested: the Conciliation Committee's findings ... that the Secretary-General's decision ... to terminate the Applicant's service on grounds of unsatisfactory service was substantiated. The Applicant therefore respectfully requests the rescission of the Secretary-General's decision ...

REMEDY SOUGHT

- The Applicant ... requests his reinstatement on full salary and allowances for the remainder of the period of his two-year fixed-term appointment ...
- The Applicant requests payment of the Mobility and Hardship Allowance [(MHA)] on the basis of his four previous duty stations;

- [The Applicant] requests payment in lieu of shipping allowance ...
- The Applicant also requests financial compensation for the personal and professional prejudice caused by his unjust termination, the humility and affront to his human dignity and moral damages, in an amount of [US$ 25,000] and reimbursement of his legal expenses."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2003 and once thereafter until 31 December 2003;

Whereas the Respondent filed his Answer on 18 December 2003;

Whereas, on 18 June 2004, the Applicant filed Written Observations, amending his pleas as follows:

"97. ... [R]equests the Tribunal:

- to order for a hearing in person of the Parties;

...

- to find that the Respondent's decision of 19 July 2002 to terminate [his services is] null and void being:

  i. Unfounded in fact ...

  ii. Motivated by a desire to avoid addressing serious allegations raising questions ... of management ...

  iii. The procedure followed in determining the Applicant's unsatisfactory performance was flawed.

  iv. The Conciliation Committee was established in a manner that was irregular ..."

Whereas, on 18 November 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the Report and the Executive Summary of the Conciliation Committee reads, in part, as follows:

"[The Applicant] was given a fixed term appointment with ISA for two years in Kingston, Jamaica, as Chief, Administration and Management, at the P-5, step I level, effective 4 December 2001. Upon [the Applicant's] entry on duty, [the] Deputy to the Secretary-General (DSG), gave him a full briefing on the nature of his work and the expectations of the Authority as the employer. The [Applicant's] letter of appointment clearly state[d] that the offer of

appointment [was] on the basis, inter alia, of his certification of the accuracy of information provided by him in the Personal History form and that the appointment was to the position of Chief, Administration and Management, at the P-5, step I level. It also provided that the fixed-term appointment [might] be terminated prior to its expiration date in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case the Secretary-General [would] give 30 days written notice or one month salary and allowances in lieu thereof. ...

[On 10 December 2001, after ascertaining from the records that Kingston was the Applicant's fifth duty station, it was decided that the Applicant should be paid MHA as a lump sum. Subsequently, the Applicant was advised that, as one of his duty stations, Washington, was not part of the United Nations system, he was only entitled to MHA on the basis of four duty stations.]

[In March 2002, the Applicant was paid US$ 12,000 in lieu of shipping entitlements.]

[On 17 June 2002, the Applicant wrote a letter to the Secretary-General, requesting a meeting to discuss a number of "sensitive" issues. According to the Respondent, this letter was never received by the Secretary-General.]

The Secretary-General, by a letter dated 19 July 2002, informed [the Applicant] that, in accordance with the terms of the letter of appointment and the relevant provisions of the Authority's Staff Regulations and Staff Rules, he had decided to terminate his appointment with effect from 31 July 2002, on the grounds of unsatisfactory performance. The letter cited examples of specific instances of unsatisfactory service:

> '(i) Wrongful payment of non-accountable shipping allowances to several staff members, including [himself], in clear breach of the Staff Rules.
>
> (ii) Advance and overpayment of mobility and hardship allowance to [himself] when [he] should know that [his] previous service under appointments of limited duration [did] not entitle [him] to such allowance.
>
> (iii) [The Applicant's] failure to contribute in a meaningful way to the preparation of the budget of the Authority.
>
> (iv) [The Applicant's] failure to arrange for the audit of the Authority's accounts in a timely manner.
>
> (v) [The Applicant's] poor personnel management skills.
>
> (vi) [The Applicant's] general lack of competence in performing [his] duties to the standard expected of a staff member at the P-5 level.'

[According to the Secretary-General, his referees who might have some knowledge of his work either gave unhelpful appraisal of his performance or stated that they were unable to give references for him. Thus, it was apparent to the Secretary-General that the Applicant did not possess the necessary competence and abilities to perform the functions of a post at the P-5 level.]

By a letter dated 14 August 2002 ... [the Applicant] sought a review of the Secretary-General's decision in accordance with the provisions of rule 111.2 (a) of the Staff Rules. He alleged that there was breach of due process and

> further alleged that the letter of termination of appointment was a reaction to his efforts to alert the Secretary-General of mismanagement and irregularities in the Authority. He also made a series of allegations against the Secretary-General and other senior staff.
>
> In a letter dated 9 September 2002, the [DSG] ... responded on behalf of the Secretary-General to [the Applicant's] letter of 14 August 2002. It was conveyed to [the Applicant] that the Secretary-General, after having reviewed the matter, could find no substantive reason to alter his decision to terminate [his] contract. The Secretary-General further responded that [the Applicant's] letter was full of misrepresentations, distortions and fabrications. It was also stated that no trace could be found of [the] letter, which [the Applicant] claimed he had sent to the Secretary-General on 17 June 2002, and that it could therefore only be another fabrication. Reference was also made to additional matters, which came to light subsequently and reflected negatively on [the Applicant's] conduct inside and outside the Authority and his inability to handle the responsibilities and position of Chief of Administration and Management and of an officer at the P-5 level. These matters were allegations of dealings with junior female staff, which bordered on sexual harassment, and allegations of downloading pornographic material from the Internet during office time and with office equipment. It also referred to some unsavoury remarks [the Applicant] was alleged to have made to some persons who provide goods and services to the Authority and its staff including medical and dental practitioners.
>
> [On] 9 October 2002, [the Applicant] submitted his complaint to the Conciliation Committee."

The Conciliation Committee presented its report on 28 April 2003. Its proposals, conclusions and recommendations read, in part, as follows:

> "The Committee presented to the Respondent the parameters it considered appropriate and possible for seeking a conciliated agreement between the parties ...
>
> ...
>
> 43. The Respondent indicated to the Committee that it was not opposed to conciliation and that it would be prepared to consider the approach proposed by the Committee, as part of a conciliated settlement. ...
>
> ...
>
> 45. The same proposal as presented to the Respondent ... was communicated to the Complainant by the Chairman of the Committee by *letter dated 10 January 2003* ...
>
> ...
>
> 47. At the meeting with the Committee, the Complainant informed the Committee of his unwillingness to accept the proposals of the Committee to achieve a conciliated settlement. In the event of failure to conciliate between the parties, the Committee is required to draw up a report summarizing the procedure followed, the arguments of the parties and the recommendations of

the Committee. Accordingly, this report has been drawn up and deals with matters in contention, comprehensively and extensively.

...

SECTION VIII ***CONCLUSIONS***

91. In considering this matter and in arriving at its conclusions the Committee was mindful of the provisions of article 167 of the [United Nations] Convention on the Law of the Sea ...

92. The Committee after examining all the facts in this matter was satisfied that there was ample material on record to support the conclusion that the termination of the Complainant's service with the Authority on grounds of unsatisfactory service has been fully substantiated as elaborated in this report. It can only be concluded that the Complainant withheld material information regarding his lack of qualifications for the post of Chief of Administration and Management at the high level of P-5. The Authority was thereby mislead into giving him an appointment, at a level at which he was not capable of performing. Immediately upon entering on duty the facts disclose that he knowingly misapplied the experimental practice of another organization to his own financial benefit in breach of the Authority's Staff Regulations and Rules and the conditions of his letter of appointment. His declarations in his Personal History form regarding the employment status of his wife were certainly seen to be false to his knowledge. His claim and the receipt of payment for Hardship and Mobility Allowance based on misleading information about his previous duty stations could only be concluded to be for improper personal gain. Cumulatively, these acts would be considered to constitute serious impropriety, particularly in the case of a staff member who takes on the responsibility of Chief of Administration and Management, charged with implementing faithfully the Staff Regulations and Rules of an organization.

93. The Complainant, rather than defend his own incompetence and acts of impropriety, attempted to allege or insinuate impropriety and mismanagement on the part of the Secretary-General and other senior staff of the Authority. The Committee examined many of these allegations and found them to be unsubstantiated and misrepresentations of fact. Nevertheless, in order to achieve a conciliated resolution of the complaint, the Committee made a proposal ... which was accepted by the Secretary-General but rejected by the Complainant."

On 4 July 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The termination of the Applicant's appointment for unsatisfactory service was in breach of ISA's own Staff Regulations and Rules.

2. The charges of unsatisfactory performance are ill-founded.

3. New charges in the letter of 19 September 2002 are irrelevant to the termination decision, and also ill-founded.

4. The composition of the Conciliation Committee was illegal: the Rules of ISA do not conform to the ISA Staff Regulations.

5. During the conciliation process, new charges were brought forward in the Respondent's Reply of 11 November 2002: there were also errors in the report and the recommendations of the Conciliation Committee.

6. In general, the Conciliation Committee acted more as an accusatory body than as a conciliation body.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's contract fell within the discretion of the Respondent. As this was not a disciplinary measure, there was no obligation to hold disciplinary proceedings.

2. The Applicant was afforded due process and the decision was not tainted by improper motivation.

3. There is ample evidence of the unsatisfactory service of the Applicant and the allegations made in this regard are well-founded. The decision of the Respondent cannot be vitiated as having been unreasonable or based on erroneous findings of fact.

4. In causing payment of a shipping allowance to be made to himself and to others, the Applicant was applying a procedure that had been adopted as a pilot programme by UNDP applicable to certain staff holding UNDP letters of appointment. There was no basis for applying the same procedure to the staff of the Authority.

5. The Applicant was never entitled to MHA on the basis of four previous duty stations.

6. The Respondent rejects the Applicant's assertions that the Conciliation Committee was illegally constituted and biased in that it did not include staff participation and was established without prior consultation with the ISA Staff Committee. The Respondent also rejects the allegations of bias and improper motivation on the part of the members of the Conciliation Committee.

The Tribunal, having deliberated from 5 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant asks the Tribunal to order the Respondent to produce a number of documents. The Tribunal, however, considers that it has sufficient documentation to

adjudicate the issues raised by this Application and, accordingly, it declines to issue such order.

II. Before entering into what constitutes the subject of the present appeal, the Tribunal believes it must engage in some considerations regarding the administrative procedures available in the ISA before a case reaches the Tribunal. The Staff Regulations and Rules of the ISA have established, for disciplinary matters, a procedure which seems adequate to the finding of facts and which would normally permit the Tribunal to consider cases coming from that jurisdiction. However, the same Regulations and Rules make no provision for fact-finding in cases that involve non-disciplinary matters. In contrast with most organizations within the family of the United Nations, there is no advisory body like the Joint Appeals Board (JAB) which could find the facts of the case in a quasi-judicial manner, and advise the administrative authority before it makes its final decision. There is, in its place, a "Conciliation Committee", the mission of which does not seem to be one of finding facts, so much so that its President himself said, at a certain moment in the consideration of the Applicant's plight, that the Conciliation Committee was not an "investigative body". Even a perfunctory look at ISA staff rules 111.1 and 2, regarding the establishment of, and the proceedings before, the Conciliation Committee, shows that this body is not made to ascertain facts. There is no reference made to any powers to call witnesses or to pose questions to the parties or to request documents or evidence from other organizations or offices or the like. Its only function seems to be, according to the cited Rules, that of looking for a common ground of agreement between the positions of the parties. Unlike a conciliation body as is known in international law, for example, where fact-finding and solution proposals go hand in hand, the Conciliation Committee of the ISA as set out in the above-mentioned provisions, seems to be a mediator, as understood by international law. Such mediation function is, by its very nature, much less concerned with a solution on the merits, or with either an adverse or investigative process, than with a quick and smooth resolution of a conflict. That is why mediators do not generally attempt to ascertain the facts of a case or legal background thereto, but rather focus on the possibility of simply harmonizing interests and look for a way to solve the conflict.

III. The Tribunal has not been designed for fact-finding and is not properly equipped to fulfil that function, which has to be exercised by joint advisory bodies, such as the JAB and the Joint Disciplinary Committee (JDC). So, unless a joint

advisory body along the lines of the JAB is also established by the ISA for non-disciplinary cases, it may very well be that the Tribunal may not be able in the future to accept a case where facts are not established by such a joint body. Alternatively, the parties may wish to provide to the Tribunal a signed Statement of Agreed Facts. As the Tribunal said in *Makil* (Judgment No. 1009 (2001)).

> "The Statute of the Tribunal does not envisage that findings of fact upon which a decision of the Tribunal is reached would ordinarily or usually be made following the Tribunal's own investigations or upon facts found by the Tribunal itself. This is so because matters coming before the Tribunal arrive almost invariably after a preliminary investigation by a JDC or a JAB or like body which carries out investigations and makes findings of facts and then reports thereon. The exception to this general rule arises when the parties have no dispute as to the facts and the matter can be referred to the Tribunal in the first instance on the basis of 'Agreed Facts', in accordance with article 7 of the Statute. Where an application is submitted on the basis of such agreed facts and it transpires that sufficient facts have not been agreed as would enable the Tribunal to embark on a hearing and the making of a decision, the Tribunal will ordinarily refer such a case back to the parties to see if they can agree on sufficient facts or, in default, refer the matter to a JAB for a further investigation or fact finding, as was done for example in Judgement No. 902, *MacNaughton-Jones et al.* (1998).
>
> Accordingly, the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases. For instance, it enjoys the power to have oral hearings, albeit it exercises this power infrequently."

IV. The Tribunal is satisfied that the Conciliation Committee has gone a long way, notwithstanding the limitations imposed upon it by the rules governing its functioning, in establishing certain relevant facts that the Tribunal considers decisive. Having said that, the Tribunal wishes to state, in the present case, that there are facts which are

easily ascertainable by examining the information contained in the dossier, and that those easily ascertainable facts are sufficient to enable the Tribunal to pronounce a judgement on the substance.

V. The main issue in this case is whether or not the termination of the Applicant's appointment prior to the expiration of his contract was lawful, i.e., in accordance with his terms of employment, including the Regulations and Rules of the ISA. Regulation 9.1 specifies the reasons for separating a staff member with a fixed-term contract in its subparagraphs (a) to (d). The Secretary-General may, accordingly, terminate the appointment of a staff member holding a permanent appointment and a staff member with a fixed-term contract prior to the expiration date as follows (mention is made only of those *prima facie* applicable to the present case):

> "(a)(i) If the services of the individual concerned prove unsatisfactory;
>
> ...
>
> (a)(v) For such other reason as may be specified in the letter of appointment;
>
> ...
>
> (b)(i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by article 167, paragraph 2, of the Convention;
>
> (b)(ii) If facts anterior to the appointment of the staff member and relevant to his suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Convention and these Regulations, have precluded his or her appointment.
>
> ...
>
> (d) The Secretary-General may terminate the appointment of a staff member with a fixed-term contract prior to the expiration date for any of the reasons specified in subparagraphs (a) [and] (b) ..., or for such other reason as may be specified in the letter of appointment."

VI. The Tribunal considers that it is important to dwell somewhat on the way the Respondent communicated to the Applicant his decision to terminate the Applicant's contract. In his letter of 19 July 2002, the Respondent mentions "the terms of your letter of appointment" and the "relevant provisions of the Authority's Staff Regulations and Rules" as the norms applicable to this particular case. In fact, then, the Respondent is invoking subparagraphs (i) and (v) of Regulation 9.1 (a), the last one being identical to the last words of subparagraph (d) of the same Regulation 9.1. The

letter announces to the Applicant that termination will take effect as of 31 July 2002, and that there will be a payment of one month salary in lieu of notice.

Although the main reason mentioned in the letter was that of "unsatisfactory services", the Tribunal notes that both grounds ("unsatisfactory service" and the "other reasons that may be specified in the letter of appointment") have been invoked by the Respondent, not only because of the mention the letter makes of the Applicant's terms of employment, but mainly because when the Respondent gave examples of actions and omissions constituting "unsatisfactory service", he mentioned:

> "[(i)]wrongful payment of non-accountable shipping allowances to several staff members, including yourself, in clear breach of the Staff Rules; [(ii)] advance and over-payment of mobility and hardship allowance to yourself when you should know that your previous service at the P-3 level under appointments of limited duration does not entitle you to such allowance; [(iii)] your failure to contribute in a meaningful way to the preparation of the budget of the Authority; [(iv)] your failure to arrange for the audit of the Authority's accounts in a timely manner[; (vi)] your poor management skills[; and, (vii)] your general lack of competence in performing your duties to the standard especied of a staff member at the P-5 level."

Some of these reasons were due more to the lack of personal integrity of the Applicant than with the services he gave the Authority, like (i) and (iii). It is precisely because these traits of the Applicant's character were mentioned in the letter of 19 July, that other actions of the Applicant confirming that lack of integrity, like his failure to mention that his wife was employed by the Organization and that, therefore, he was not entitled to dependency allowance, may be taken into consideration by the Tribunal notwithstanding having been brought to attention only after the Secretary-General's decision to terminate his appointment was communicated to the Applicant.

Likewise, the other reasons for termination under Regulation 9.1 are applicable, namely, "conduct not meeting the highest standards of integrity required by article 1(6", paragraph 2 of the Convention", and:

> "If facts anterior to the appointment of the staff member and relevant to his suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Convention and these Regulations, have precluded his or her appointment."

Both clearly emerge from the omissions from, and ambiguities in, the Applicant's Personal History form, among them his careful concealment of the fact that none of the posts he had held before his appointment to the Authority ever exceeded the P-3 level.

Jura novit curia, as the Latin saying goes, and it is therefore up to the Tribunal to call things by their legal name. Besides, then, unsatisfactory services, the Tribunal finds that such reasons as identified under staff regulation 9.1 (b) (i) and (ii) are more than sufficient to justify the termination of the Applicant's contract. It is not necessary to enter into whether or not his managerial skills were really satisfactory or if he should or should not have prepared the budget.

VII. The Secretary General of ISA chose not to pursue disciplinary action against the Applicant in this case. He chose to have the matters alleged against the Applicant investigated and dealt with as performance issues rather than as allegations of misconduct, thus obviating the need to investigate or seek to prove the mental element or the wilfulness of the actions which would ordinarily be relevant had he chosen to seek to establish misconduct. The Tribunal considers that this decision was legitimate in the circumstances, having regard to the nature of the issues raised. This would not necessarily be so had they been of different character, as some activities can only be viewed as allegations of dishonesty, and in such instances, disciplinary procedures must be involved.

VIII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1215

Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1215

Case No. 1305: NGWINGTE Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 19 August 2002 and on 21 May 2003, Mary Mba Ngwingte, a staff member of the International Maritime Organization (hereinafter IMO), filed Applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 June 2003, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, inter alia:

> "1. *To rule* that the refusal by the Respondent to recognize the Applicant's injury as work-related, without seeking the advice of the Advisory Board on Compensation Claims (ABCC), was a violation of IMO staff rule 106.3 and that the refusal denied to the Applicant the benefit of the procedure in Appendix D to the [IMO] Staff Rules ...
>
> 2. *To rule* that the decision of the Respondent not to recognize the Applicant's injury as work-related was therefore null and void;
>
> 3. *To order the Respondent* to establish the ABCC as required by article 16 of Appendix D to the [IMO] Staff Rules, subject to any necessary adjustments to its membership in the interest of impartiality and practicality, and to seek its advice on the claims of the Applicant before taking a new decision;
>
> 4. *To order the Respondent* to pay to the Applicant the sum of 10,000.00 [pounds] sterling to compensate her for the trouble to which she has been put in

> seeking to have her claim for compensation under Appendix D examined and for the delay which is due in large part to the failure of the Administration to follow its own rules and, in particular, to the fact that the Head of the Personnel Section (later Deputy Director, Human Resources,) misled the [Joint Appeals Board (JAB)] ...
>
> 5. *To order the Respondent* to make an award to the Applicant in respect of her claim for the payment of compensation equivalent to two years' net base salary 'on the basis of the physical pain and mental suffering [of the Applicant] as well as IMO's negligence' ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 5 January 2004 and twice thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 15 April 2004;

Whereas the Applicant filed Written Observations on 3 September 2004, and the Respondent commented thereon on 30 September;

Whereas the Applicant filed additional Written Observations on 4 October 2004, and, on 19 October, the Respondent responded thereto;

Whereas, on 28 October 2004, the Applicant submitted further comments;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO as a Principal Clerk-Secretary in the Personnel Services Unit, Personnel Section (now called Human Resources Services), in the Administrative Division, at the G-6, step V level, on 1 September 1995. She was promoted to Senior Administrative Assistant, at the G-7, step V level, on 1 March 1997.

By June or July 1998, the Applicant began to experience pain in her shoulder and right wrist which was diagnosed by her general practitioner as repetitive strain injury (RSI) or work-related upper limb disorder (WRULD). The general practitioner recommended that her workstation be changed. The Applicant related this information to the IMO Medical Adviser's Office.

On 17 March 2000, the Head, Personnel Policy and Services Unit (subsequently Head, Personnel Section), informed the Head, Information Technology Section, by memorandum that "one of the levers" of the printer used by the Applicant for printing the forms was broken and that it was "urgent" that the machine be repaired or replaced because "quite a large number of Personnel Action forms are prepared each month".

On 17 April 2000, the Staff Nurse advised the Applicant that a new printer was being ordered and that it would arrive shortly. She also advised her that the IMO

Medical Adviser "would like to see [her] again within the next 2-3 weeks to review [her] situation". On 7 July, the Staff Nurse wrote to the Head, IT and Information Systems, requesting an update on the replacement printer and stating that the Applicant was continuing to "have problems directly resulting from her current defective printer". She added that "any work-related injury or illness [was] a serious matter of concern and should be treated with the [utmost] urgency". On 27 July 2000, the IMO Medical Adviser advised the Head, Personnel Section, that he had seen the Applicant, who continued to have wrist problems; that he had advised her to see her own general practitioner; that she should refrain from work for a minimum of two weeks; and, that she should not resume work without medical clearance.

On 14 August 2000, the IMO Medical Adviser reported to the Head, Personnel Section, that he had "reviewed" the Applicant and that "her condition ha[d] improved and she [could] now return to work in a limited capacity". He recommended that she not use the defective printer. On 15 August 2000, the Applicant wrote to the Head, Personnel Section, stating that she had been away on sick leave for a period of two weeks. She requested that her sick leave not be counted against her normal sick leave entitlement and that expenses from medical treatment be covered by the Respondent, because her sick leave arose from RSI originating from the performance of her work duties.

On 21 August 2000, the Head, Personnel Section, was advised by a Personnel Officer that the IMO Medical Adviser, when consulted, had expressed the view that the Applicant's wrist-injury was a result of RSI and therefore work-related. The Personnel Officer also reported that the Director, Administrative Division, "did not accept the injury as work-related" and that the Applicant's immediate supervisor was of the view that "it was a difficult case to prove that the injury was a result of work".

On 30 August 2000 a new printer was installed.

On 28 September 2000, the Head, Personnel Section, advised the Applicant that "IMO does not accept an injury of an upper limb disorder as being service-incurred" and that, in view of the small percentage of her time spent on actually printing Personnel Action forms, IMO could not agree with the assessment that it was the broken printer which caused her injury. However, IMO did offer, as an exceptional measure, to refund the portion of medical expenses not covered by medical insurance. The record does not show any reply from the Applicant to this offer of financial assistance.

On 3 November 2000, the Applicant wrote to the IMO Secretary-General requesting review of the decision not to recognize her condition as work-related for purposes of sick leave and payment of medical expenses. On 1 December, the Applicant was advised that new medical information she had provided would be assessed and that the Secretary-General would review her case and inform her of the outcome in due course.

On 27 February 2001, the Applicant wrote to the Chairman of the IMO JAB, requesting that a JAB be convened to consider her case. The Applicant's request was granted, and the JAB was established on 8 October 2001. On 20 November 2001, the Applicant submitted "clarifications" to the JAB, adding a request for two years' compensation and, in the event that she cease work by reason of disability, payment of salary and allowances until her return to work.

On 27 January 2003, the Head, Personnel Section, wrote to the Chairman of the JAB, stating that

> "in the event that, ... the JAB finds that the injury was in fact 'attributable to the performance of official duties' the compensation issues must be left, under the provisions of article 11 of Appendix D of the Staff Regulations, to an [ABCC]. In this case, issues relating to compensation do not fall under the competency of the JAB whose task should be 'limited to the consideration of the issue whether the injury was work-related'."

The JAB adopted its report on 28 February 2003. Its considerations and recommendations read, in part, as follows:

> "**Consideration** ...
>
> 2.1 ... [T]he Board ... agreed as follows:
>
> 1. The condition RSI ... or WRULD ... is a recognized medical condition in the U.K. It has certain diagnostic criteria which can only be established by a Consultant Rheumatologist or Occupational Health expert with experience in this disorder.
>
> 2. The statement of [the Head, Personnel Section,] ... is very difficult to comprehend. Where did he receive the authority to comment on a medical disorder in the terms *"I would like to inform you that IMO does not accept an injury of an upper limb disorder as being service-incurred"?*
>
> 2.2 The Board feels however that the medical evidence available on the case is sparse.
>
> ...
>
> 2.3 It does seem to the Board after studying all the documentation that in spite of being warned on 7 June 2000 by the Staff Nurse ... that 'any work-

related injury is a serious matter of concern and should be treated with the [utmost] urgency and prompt attention', IMO did delay unnecessarily the replacement of her printer/work layout and unduly delayed answering her numerous memos and requests.

2.4 As for the Appellant's claim under Appendix D to the Staff Rules and Regulations submitted on 20 November 2001, i.e. 9 months after she filed her appeal, it is a matter which goes beyond the terms of reference of the JAB.

3 Recommendations

3.1 The Board would recommend a full medical report to be obtained from an independent rheumatology or occupational health expert who has the benefit of studying all of the Appellant's previous medical history, including her [general practitioner's] records, and can make an informed diagnosis.

3.2 In addition the Board would recommend that:

1. IMO should act much more quickly and also more sympathetically in any future similar cases; and,

2. Members of staff should not make medical comments or refute diagnosis when they obviously have no expertise."

On 11 March 2003, the Secretary-General, IMO, transmitted a copy of the report to the Applicant and informed her that he had noted the conclusion of the JAB and accepted its recommendations as set out in paragraphs 3.1 and 3.2, and that she would be contacted shortly with regard to recommendation 3.1.

On 4 April 2003, the Applicant was advised that an appointment had been set up for her to see the IMO Medical Adviser. On 9 April, however, the Applicant indicated that the appointment with the IMO Medical Adviser would not be in accordance with the JAB recommendation since that Board had said the medical report should be obtained from an "independent" health expert. Subsequently, the IMO Medical Adviser organized an appointment for the Applicant with an independent specialist. Following the Applicant's visit to the independent specialist, a report dated 6 June was received by the IMO Medical Unit, which advised the Administration, on 28 July, that the Applicant refused to authorize the release of the contents of the report to the JAB.

On 23 June 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The terms of reference of the ABCC include consideration of the question of principle as to whether medical condition is service-incurred. No decision

on that matter can lawfully be taken by the Respondent until and unless he has previously received the advice of an ABCC.

2. The only way to restore the legality of the situation is for the Respondent to establish the ABCC in accordance with Appendix D to the Staff Regulations and Rules of IMO and to seek its advice before taking a new decision.

3. The Applicant believes that the claim for compensation on the grounds of IMO's failure to follow its own rules, especially the misdirection of the JAB by the Head, Personnel Section, and the claim for compensation for physical pain and mental suffering are self-explanatory.

Whereas the Respondent's principal contentions are:

1. The Applicant's petition is premature in light of the fact that the Secretary-General has accepted the recommendation of the JAB and the Applicant has not formally presented a claim for compensation supported by medical evidence, including the results of the examination.

2. The appeal was properly considered by the JAB and the Head, Personnel Section, properly requested the JAB to limit its consideration to the issue of whether the injury was service-incurred.

3. The Respondent's request that the Applicant undergo a medical examination by an occupational health specialist did not violate her rights.

4. The Respondent is not obligated to establish an ABCC until and unless the Applicant produces the report from the occupational health specialist to him.

5. The Applicant herself was partly responsible for the delays by not providing the documentation to allow further consideration of her original claim and these delays did not cause any additional injury.

The Tribunal, having deliberated from 3 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant challenges the refusal of the IMO Administration to treat her RSI as an injury attributable to the performance of duties pursuant to Appendix D, as in effect under the Staff Regulations and Rules of the United Nations, as adopted by the IMO. Specifically, the Applicant challenges the authority of the Administration to make that decision without first seeking the advice of the ABCC, claiming a violation of IMO staff rule 106.3. The Applicant requests the Tribunal to find null and void the decision that her injury is not service-incurred, and further requests that the Tribunal

order the establishment of an ABCC pursuant to article 16 of Appendix D. The Applicant seeks compensation for delay in addressing her claim and for her physical pain and suffering and for the IMO's alleged negligence.

IMO staff rule 106.3 provides:

> "Staff members shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of IMO, in accordance with the rules laid down in appendix D to the Staff Rules of the United Nations. The text of appendix D to the Staff Rules of the United Nations is given in appendix D to these Rules. In the case of staff members in the General Service category, appropriate adjustments in the minimum amounts of compensation may be made by the Secretary-General taking into account the proportion which such staff members' salaries bear to the base salary of grade P.1."

II. On 15 August 2000, by letter to the Head, Personnel Section, the Applicant notified the Administration that she was out on sick leave arising from an RSI. As a result, the Applicant requested that her injury be recognized as service-incurred, that her time off on sick leave not be counted against her normal sick leave entitlement and that IMO bear the expenses of her medical treatment. In response, the Head, Personnel Section, unilaterally (*i.e.*, without any input from the ABCC) made a determination that the Applicant's RSI was not service-incurred. In his letter to the Applicant, dated 28 September 2000, the Head, Personnel Section, informed the Applicant not simply that her injury was not service-incurred, but that "IMO does not accept an injury of an upper limb disorder as being service-incurred". Notwithstanding his denial of service-incurred status, however, the Head, Personnel Section, offered to settle the matter by refunding to the Applicant the percentage of medical expenses not reimbursed by her medical insurance. The Applicant, however, did not accept the Administration's offer of settlement and, by memorandum of 3 November 2000, appealed the decision to the Secretary-General of the IMO. After several months without a response from the Secretary-General of the IMO, on 27 February 2001 the Applicant requested the Administration to convene a JAB to consider her case. Two years later, the JAB issued its opinion, on 28 February 2003.

III. In reaching a decision that was largely favourable to the Applicant, the JAB criticized both the delay and lack of compassion with which the IMO Administration had acted in this matter. In addition, the JAB was dismayed at the unilateral decision of the Head, Personnel Section, that the Applicant's injury was not service-incurred.

The JAB was particularly surprised by the specific language used by the Head, Personnel Section, in denying service-incurred status, noting:

> "The statement of [the Head, Personnel Section,] in his letter of 28/9/2000 is very difficult to comprehend. Where did he receive the authority to comment on a medical disorder in the terms *'I would like to inform you that IMO does not accept an injury of an upper limb disorder as being service-incurred'*?"

Although the JAB refused to decide the issue of service-incurred injury, on the basis that such a decision went beyond the terms of reference of the JAB, the JAB did conclude that the medical evidence presented in the case was sparse. The JAB recommended that the Applicant obtain a full medical report by a qualified health expert, who could make an informed diagnosis of her injury. The Applicant submitted her case to the Tribunal on 23 June 2003.

IV. The Tribunal first addresses the threshold question of whether the IMO Administration had authority, as it asserts, to determine, without the advice of the ABCC, whether the Applicant's RSI was "attributable to the performance of duties" under Appendix D. According to the IMO Administration, historically, it has made the initial determination of whether a staff member's injury is service-incurred, and it requests the advice of the ABCC only in two instances. First, when the Administration determines that an injury is attributable to the performance of duties, it refers the case to the ABCC in order for the ABCC to determine the level of compensation to which the staff member is entitled by virtue of the service-incurred injury. Second, the Administration refers a matter to the ABCC when it determines that the injury is not service-incurred, and the staff member disputes the determination. In the latter case, the ABCC acts as an appellate body to adjudicate the dispute. The IMO Administration considers this use of the ABCC to be "consistent with the wording and spirit of Appendix D to the Staff Rules" and asserts that "this approach has not had any adverse effect on the ... legitimate interests of staff members".

V. In the instant case, the IMO Administration exercised its believed authority to deny the Applicant service-incurred injury status. Thereafter, the Administration did not advise the Applicant to bring her claim to the ABCC, but instead she appealed to the JAB.

VI. The Tribunal finds that the IMO Administration's interpretation of Appendix D and the function and role of the ABCC in matters involving service-incurred injuries is

misguided, and the Tribunal is surprised that the Administration would find such interpretation "consistent with the wording and spirit of Appendix D", as it contravenes the manner in which the United Nations currently implements and historically has implemented Appendix D.

VII. The Tribunal notes that Appendix D is designed to compensate staff members for injuries occurring in the performance of their duties. It calls for the establishment of an ABCC to make recommendations to the Secretary-General "concerning claims for compensation under [Appendix D]". Although Appendix D, on its face, is unclear as to who makes the initial determination as to service-incurred status, the long-standing practice of the United Nations has been that the Secretary-General is the one who makes the determination, *based on the recommendations* of the ABCC. This is clearly set out in Information Circular ST/ADM/SER.A/564 dated 30 September 1959.

VIII. The Tribunal can well understand the requirement that the ABCC make recommendations, based upon which the Secretary-General can then determine such service-incurred status. First, the ABCC is expert on matters involving compensation claims, including whether and to what extent injuries are service-incurred. Second, and perhaps more importantly, the ABCC has authority to convene a medical board to assist the ABCC in reaching a determination regarding service-incurred status, if necessary. The IMO Administration, on the other hand, lacks both the expertise of the ABCC and the ability to convene a medical board, if needed. Moreover, given the sensitive and personal nature of staff members' medical conditions and treatments, the Tribunal finds such matters to be more appropriately reviewed by the ABCC. Thus, the Tribunal finds that the Administration erred in unilaterally denying service-incurred status to the Applicant and that this decision is therefore null and void and of no effect, having been taken without proper authority or competence.

IX. The IMO Administration's failure in this respect, however, is more than just a simple misunderstanding of the appropriate application of Appendix D and the role of the ABCC. While the Tribunal does not ascribe malicious intent to the Administration in the erroneous application of Appendix D, the Tribunal notes that the Administration even failed to apply Appendix D according to its own stated interpretation. Although the Administration asserts in its Answer that one of the circumstances in which it submits the issue of service-incurred status to the ABCC is when a denial of such status has been made by the Administration and the Applicant disputes the

determination, no submission occurred in this case. When the Head, Personnel Section, determined that the Applicant's injury was not service-incurred and the Applicant disputed that conclusion, the Administration, according to its admitted but erroneous interpretation of Appendix D, should have then referred the matter to the ABCC. It did not. Instead, the Applicant was referred to the JAB, which clearly had no authority to determine whether the injury was service-incurred.

X. In defence of its failure to refer the matter to the ABCC, the Administration asserts that it had no idea the Applicant was making a claim for compensation under Appendix D that would have required referral to the ABCC, because the Applicant never made a claim for compensation. In this regard the IMO Administration states that "the Administration was not aware that [the Applicant] intended to make a claim under Appendix D. Therefore the Administration could not have 'advised her on procedures' as suggested." The Tribunal is more than a bit surprised by this admission. Although the Tribunal notes that the Applicant did not use the words "compensation" or "claim" or request a fixed sum of money in her initial memorandum to the Administration, dated 15 August 2000, it is clear that the Applicant was requesting compensation in the form of reclassification of sick leave time for, and payment of, medical expenses attributable to, what she believed was a service-incurred injury. Again, the Administration's assertions in this regard indicate either disingenuousness or a lack of competence.

XI. Further, the Administration's claim that the Applicant failed to file the appropriate form in order to claim an Appendix D benefit is also unfounded. In a memorandum to staff members, dated 3 April 1990, the Director, Administrative Services, set forth the procedures for reporting of injuries arising from work-related accidents. In that memorandum, the staff members were directed to report the injury to the Staff Nurse verbally, followed by a written report to the Head, Personnel Section. Thereafter, "reports [would] be assessed with a view to determining whether or not such injuries fall under the applicable provisions of Appendix D to the Staff Rules". The Applicant followed this directive in all respects. Moreover, even if the Applicant had filed a form to the ABCC, the Administration, based upon its flawed interpretation of Appendix D, would have considered that filing violative of its perceived authority to make the initial determination of service-incurred status. The Applicant should not be penalized in this respect.

XII. The Tribunal is also more than a little concerned by the sweeping statement made by the Head, Personnel Section, denying the Applicant's claim for service-incurred status. The Tribunal is at a loss to understand how an individual, not a member of the ABCC and with no apparent medical expertise, could so broadly ordain that upper limb disorders could never be service-incurred. What is an "upper limb disorder"? Did he mean that if a filing cabinet had fallen on to the Applicant and dislocated her shoulder or smashed her elbow, this would never be considered a service-incurred injury? Obviously, the Administration, through its Head, Personnel Section, wildly overstepped its bounds and mischaracterized the IMO's position on service-incurred injuries. Aside from violating the Applicant's rights to have her injury reviewed by a competent body, this inappropriate statement undermined the authority of the Administration. Thus, the Tribunal would recommend that, in the future, the IMO Administration follow the correct application of Appendix D.

XIII. Since the Tribunal finds that the issue of whether the Applicant's injury was service-incurred should have first been reviewed by the ABCC before the Secretary-General of IMO made his decision, and that the failure of the Administration to follow the appropriate procedure was a violation of the Applicant's rights to be heard by the ABCC, the Tribunal finds that the matter should be reviewed now by the ABCC, so that the ABCC can make recommendations to the Secretary-General regarding whether the Applicant's injury is service-incurred and if so, whether the Applicant is entitled to any compensation resulting therefrom.

XIV. The Tribunal now turns to the issue of delay. As the JAB found, the "IMO did delay unnecessarily the replacement of [the Applicant's] printer/work layout and unduly delayed answering her numerous memos and requests". Accordingly, the JAB recommended that "IMO should act much more quickly ... in any future cases". The Tribunal concurs with the JAB's findings and recommendations and finds that, because the Applicant suffered undue delay at the hands of the IMO Administration, in the pursuit of her claim, she is entitled to be compensated.

XV. Therefore, in consideration of the foregoing, the Tribunal:

I. Orders the Respondent to establish an ABCC under article 16(a) of Appendix D to the IMO Staff Rules for prompt review of the Applicant's request to treat her RSI as service-incurred and to make

recommendations to the Secretary-General as to whether her injury was service-incurred;

2. Orders the Administration to pay to the Applicant the sum of $10,000 for violation of her right as a staff member to have the determination of whether her RSI was service-incurred be determined by the Secretary-General based upon recommendations by the ABCC and for the delay related thereto; and,

3. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary